TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC., APPELLANT,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED DECEMBER 11, 1935.

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INDEX

	Original	Print
Record from Superior Court of Thurston County	1	1
Complaint	1	1
Exhibit "A"—Radio broadcasting station license—Station KOMO	16	14
Exhibit "B"—Radio broadcasting station license—Station KJR	18	16
Injunction pendente lite	20	18
Demurrer to complaint	22	19
Stipulation as to additional facts	23	20
Order overruling demurrer and judgment and decree granting permanent injunction	26	22
Notice of appeal	29	23
Proceedings in Supreme Court of Washington	30	24
Opinion, Beals, J.	30	24
Dissenting opinion, Millard, J.	45	37
Opinion per curiam, amending opinion	46	38
Order denying petitions for rehearing	47	38
Judgment	48	39
Assignments of error	49	39
Petition for appeal	60	41
Order allowing appeal	63	43
Bond on appeal (omitted in printing)	65	
Citation and service (omitted in printing)	68	
Stipulation for transcript of record	72	44
Clerk's certificate (omitted in printing)	74	
Statement of points to be relied upon and designation as to printing record	75	46

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[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. —

FISHER'S BLEND STATION, INC., a Corporation, Plaintiff,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, Members of said Commission, Defendants

COMPLAINT—Filed Aug. 28, 1933

Comes now the plaintiff, and for cause of action against the defendants, alleges:

I

That the plaintiff is and at all times herein mentioned was a corporation, organized and existing under and by virtue of the laws of the State of Washington, and that plaintiff has paid its annual license fee last due to the State of Washington.

II

That the defendants are members of the Tax Commission of the State of Washington, duly appointed, qualified and acting as such, and at present constitute the Tax Commission of the State of Washington, and that the Tax Commission of the State of Washington is vested with the administration of Chapter 191 of the Laws of 1933 of the State of Washington, more commonly known and hereinafter designated as the Occupational Tax, pursuant to Section 24, thereof, and is empowered to supervise the making of returns provided for therein, and the assessment and collection of taxes and penalties imposed thereunder.

[fol. 2]

III

That the Occupational Tax, Substitute House Bill No. 92, was passed by the Legislature of the State of Washington on March 9, 1933, and received the approval of the Gov-

ernor of the State of Washington on March 21, 1933, and took effect immediately as being necessary for the immediate support of the State government and its existing public institutions, as stated in Section 31 thereof, and thereupon became Chaper 191 of the Laws of 1933 of the State of Washington, which law states in Section 2, Subdivision 2 thereof:

"From and after the first day of August, 1933 and until the thirty-first day of July, 1935 there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

. . . . . .

"(ed) Upon every person engaging in or continuing within this State in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent."

That the terms "person", "gross income" and "business" are defined in Section 1, Subdivisions 4, 6, and 7 respectively thereof, as follows:

"(4) The word 'person' or the word 'company', herein used interchangeably, shall mean and include any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

"(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without [fol. 3] any deduction on account of losses: Provided, the term 'gross income' shall not include any payments re-

ceived on accounts or notes outstanding at the time this act goes into effect.

"(7) The word 'business' shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in taxable in the class in which it falls."

IV

That the plaintiff owns and operates Radio Station KOMO, located in Seattle, Washington, with an assignment of 920 kilocycles and 1000 watts power; that plaintiff leases Radio Station KJR, located in Seattle, Washington, from the National Broadcasting Co. Inc., and Northwest Broadcasting System, Inc., and operates the same with an assignment of 970 kilocycles and 5000 watts power; and that, therefore, plaintiff is engaged in the business of radio broadcasting.

That plaintiff operates said Station KOMO by virtue of a license issued it by the Federal Radio Commission of the United States of America on February 10, 1933, a copy of which is hereto attached marked Exhibit "A" and by specific reference made a part hereof, in accordance with sections 4 and 5 of the Federal Radio Act of 1927 as amended (47 U. S. C. A. Sec-. 84 and 85), and the regulations of said Commission, bearing file No. 5-R-B-63 and Official No. 63, which license assigns said station the call letters KOMO and the radio frequency of 920 kilocycles with a power of 1000 watts, and further states that

"a licensee shall, during the term of this license, render such broadcasting service as shall serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

"* * * This license is subject to the right of use or control by the government of the United States conferred by Section 6 of the Radio Act of 1927."

[fol. 4] That plaintiff operates said Station KJR by virtue of a similar license issued it by the Federal Radio Commission of the United States of America on July 11, 1933, a copy of which is hereto attached marked Exhibit "B" and

by specific reference made a part hereof, which license bears file No. 5-R-B-67 and Official No. 67, and assigns said station the call letters KJR and the radio frequency of 970 kilocycles with a power of 5000 watts, and contains the same provisions hereinabove quoted from the license issued to Station KOMO.

V

That the art of radio broadcasting consists in transmitting electro-magnetic waves set in motion by electricity at a station, such as plaintiff's stations KOMO and KJR, and passing through space to numerous receiving instruments; that the essential elements in such communications consist of the transmitter, the connecting medium or "ether" and the receiving mechanism; that electro-magnetic waves move at the speed of light and it is not only impracticable but impossible to confine them, at least in the present state of the art, within state lines; that the receiving mechanism or receiving set detects the oncoming radio waves and amplifies them into audible sound; that all radio communication, anywhere in the United States, travels actually or potentially across state lines, and even if certain radio electric wave energy, through an accident or otherwise, should lose its force before crossing the state line, yet it potentially interfer-s with other radio communications passing interstate; and that Congress under the authority conferred upon it by Section 8, Article I of the Constitution of the United States, has assumed control of all communications by radio by the Federal Radio Act of 1927 as amended (47 U. S. C. A. sections 81-121), acting through the Federal Radio Commission, which actively and continuously supervises all such radio communications.

VI

That as a practical matter and for commercial purposes [fol. 5] the United States has been divided by the Federal Radio Commission, acting pursuant to Section 2 of the Federal Radio Act of 1927 (47 U. S. C. A. section 82) into five zones, of which the fifth zone embraces the following states and territories: Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Territory of Hawaii and Alaska.

That the Federal Radio Commission has assigned, pursuant to Section 4 of the Federal Radio Act of 1927 (47

U. S. C. A. section 84) certain quotas for each of said five zones, as set forth in Regulation No. 111 of the Federal Radio Commission, which said quotas limit and designate the radio frequency bands, types of stations and their power for each of said zones; that the radio frequencies assigned to the several radio stations in said zones represent bands of wave lengths to be used only by certain designated stations therein; that these radio frequency bands are designated as Clear Channels, High-powered Regional frequencies, Regional frequencies and Local frequencies, as set forth in Regulations Nos. 70 to 75 inclusive and Nos. 116 to 124 inclusive of the Federal Radio Commission; and that they are so assigned so as to eliminate as much interference as possible between stations on the several radio frequency bands and in the several zones.

That a Clear Channel station is assigned a radio frequency band by the Federal Radio Commission which no other station in the United is to use at the same time and, therefore, is designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States and is also assigned sufficient power to adequately broadcast in that manner; that a Regional station is assigned a radio frequency band by the Federal Radio Commission for the effective transmission of radio broadcasting over the zone in which it is located and, therefore, is designed and calculated for the effective transmission of radio broadcasting over the entire area of the zone in which it is located and is also assigned sufficient power to adequately broadcast in that manner; that the radio frequency of 970 kilocycles assigned to Station KJR is a Clear Channel assigned to the fifth zone; and that the radio frequency of 920 kilocycles assigned to Station KOMO is a Regional frequency assigned to the fifth zone.

[fol. 6] VII

That in truth and in fact Stations KOMO and KJR have been and now are engaged in broadcasting commercially in said manner over said Regional Channel of 920 kilocycles and said Clear Channel of 970 kilocycles, respectively; that said broadcasting has covered said designated areas and also certain parts of the High Seas adjacent thereto and certain parts of the Dominion of Canada, particularly the Province of British Columbia, and that such broadcasting

has been continuous and effective and has constituted the conduct of a valuable and remunerative business for the plaintiff, has furnished an effective and valuable medium of advertising to many forms of industry, particularly those interested in merchandising, wholesale and retail, upon an international, national and regional scale, and has served the listening public in said territories faithfully with many educational and entertaining features.

VIII

That the buisness of radio broadcasting has become an industry of enormous proportions, and that it has become an important factor in the business as well as the lives of the American people, financially, socially, economically and politically.

That stations KOMO and KJR are links in a system of National and Pacific Coast broadcasting in that they relay the National and Pacific Coast broadcasts of the National Broadcasting Compny, Inc. which broadcasts take precedence over all programs originating at said stations; that said National Broadcasting Company, Inc. is a corporation engaged in the business of broadcasting commercial programs, entertainment features and news over the entire United States; that the facilities of the said National Broadcasting Company, Inc. are used by the government of the United States as occasion requires for communications from the President of the United States and other officials directly to the people; that the facilities of said stations are available to the Federal government, pursuant to Section 6 of the Radio Act of 1927 (47 U. S. C. A. section 86) and the provisions of the station licenses hereinabove set forth, [fol. 7] in times of national emergency upon proclamation of the President of the United States; and that, pursuant to Section 22 of the Radio Act of 1927 (47 U. S. C. A. section 102), the facilities of said stations are made available for distress signals of ships on the High Seas and broadcasting from said stations is regulated so as not to interfere with the same.

IX

That the value of the operating systems of said stations KOMO and KJR is approximately $600,000.00, said valuation including real estate, furniture and fixtures, technical

equipment and goodwill of the business; that the gross income from the business conducted by said stations was over $300,000.00 for the year 1932 and over $100,000.00 for the period from January 1, 1933, to July 15, 1933, and that said gross income arises out of payments made by the National Broadcasting Company, Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with stations KOMO or KJR, who desire to reach the listening public in the areas and territories hereinabove described.

X

That Section 6 of the Occupational Tax Act requires plaintiff to make monthly reports and monthly payments, the first of which is due September 15, 1933, for the tax imposed by the Act for the month of August, 1933, to the defendants, which said reports set forth the information necessary for the calculation of the tax by the defendants as based on the gross income of plaintiff's business; and that heavy penalties are imposed for failure to make such reports or payments, to wit:

(a) 10% of the assessed tax to be added thereto as a penalty (Sec. 10 of the Act).

(b) 1% per month of the amount of the tax until paid to be added thereto (Sec. 10 of the Act).

[fol. 8] (c) The defendants may order the sheriff of any county to levy upon all the real and personal property of plaintiff for the payment of the tax (Sec. 15 of the Act).

(d) Defendants may instruct the Attorney General of the State of Washington to restrain plaintiff from engaging or continuing in the business of radio broadcasting until the tax assessed is paid (Sec. 17 of the Act).

(e) It is unlawful for plaintiff to fail or refuse to make said returns and plaintiff would be guilty of a gross misdemeanor and punishable in the manner provided by law for not making such returns (Sec. 23 of the Act).

(f) Defendants have the power to summon any person to testify as to any information which they might require

with reference to the imposition of the tax, and, upon refusal to obey such summons, such person will be liable to contempt of court proceedings (Sec. 25 of the Act).

XI

That plaintiff while engaging or continuing in the business of radio broadcasting, as hereinabove described, is engaged solely in foreign and interstate commerce and that the operation of the Occupational Tax Act, insofar as this plaintiff is concerned, constitutes a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce which amounts to a regulation and direct burden thereon and, therefore, is repugnant to, in conflict with and contravenes Section 8, Article I of the Constitution of the United States, which states that Congress shall have power

"* * * to regulate commerce with foreign nations and among the several states and with the Indian tribes * * *."

XII

That the Occupational Tax Act taxes some occupations and businesses, including plaintiff's, and not others; that it fixes different rates for different business activities, as set forth in the several sections of the Act, even though the Act, as stated in Section 2, Subdivision 2 thereof, hereinabove quoted in Paragraph III, imposes a tax on all business activities as one class, in that Section 2, Subdivision 2 (ba) exempts by the Governor's veto

[fol. 9] "* * * every person engaging or continuing within this State in the business of growing or raising for sale, profit or use, any article, substance, commodity or crop * * *."

and Section 2, Subdivision 2 (f) exempts by the Governor's veto

"* * * every person engaging in or continuing within this State in any business not included in the preceding subdivisions of this section and upon every person engaging or continuing in this State in the business of rendering, performing or selling services, professional or otherwise * * *."

That these vetoes exempt, from the operation of the Act, lawyers, doctors, professional men of every kind, agricultural business and all those engaged therein; and that the Occupational Tax Act, therefore, is in violation of the Fourteenth Amendment to the Constitution of the State of Washington in that it imposes a direct property tax on plaintiff which is not uniform upon the same class of property, to-wit, all business activities, within the same territorial limits and discriminates against plaintiff in the fixing of said different rates in the same class.

XIII

That the Occupational Tax Act, construed as a property tax, is also unconstitutional and void as applied to plaintiff, because it violates and is repugnant to the Seventh Amendment to the Constitution of the State of Washington, which prohibits the Legislature from amending or repealing an initiative measure within two years after its enactment, in that Chapter 4 of the Session Laws of 1933 of the State of Washington, commonly known as the 40 Mill Law, adopted as Initiative Measure No. 64 on December 8, 1932 limits taxation for state purposes at 5 mills on assessed valuation, or one-half of one per cent; and that, inasmuch as assessed valuation is established by statutory enactment as 50% of the valuation of the property, the limitation upon property levies for state purposes is in fact one-quarter of one per cent of the actual value of the property; that the rates to be applied on the gross income of plaintiff, as set forth in Paragraph III herein, under the Occu- [fol. 10] pational Tax Act exceed said figure; and that the Act, therefore, conflicts with the 40 Mill Law and, to the extent of the conflict, impliedly repeals it contrary to the said Seventh Amendment to the Constitution of the State of Washington.

XIV

That, even though the Occupational Tax Act is interpreted as an excise and not a property tax, the Act, as applied to plaintiff, by reason of the capricious and arbitrary omissions therefrom, without relation to the purposes thereof, of the classes of business activities described hereinabove in Paragraph XII, despite the fact that said Section 2, Subdivision 2 of the Act states the purpose of the

Act to be to levy "an annual tax or excise for the privilege of engaging in business activities" and defines the words "person" and "business", as quoted hereinabove in Paragraph III, as including all individuals, partnerships and corporations engaged in any activity, with the hope of gain, benefit or advantage either direct or indirect, is unconstitutional and void because it violates and is repugnant to Section 1, Article XIV of the Constitution of the United States, in that it abridges the privileges and immunities guaranteed plaintiff and denies it the equal protection of the laws; and that the Act, as so applied to plaintiff, is unconstitutional and void because it violates and is in conflict with Section 12, Article I of the Constitution of the State of Washington, which guarantees plaintiff the equal protection of the Laws and which forbids special privileges and immunities.

That, furthermore, the Act is unconstitutional and void, with reference to said provisions of the Constitution of the United States and the Constitution of the State of Washington, in that gross income is defined differently for persons in the same class (the same class being all business activities), to wit, Section 2, Subdivision 5½ of the Act, defines gross income for National Banking Associations, State Banks, Trust Companies, Mutual Savings [fol. 11] Banks, Building & Loan or Savings and Loan Associations, Stock Brokers and Security Houses and Financial Companies engaged in the business of loaning money on retail sales or all discounted or rediscounted conditional or other sales contracts, as follows:

"as to any person exercising any privilege taxable under schedules I, II, or XIII of Sec. 2 (2) (e) the term 'gross income' shall be construed to mean the gross earnings of the business from interest, discount, rentals, royalties, fees or other emoluments however designated."

That said definition of gross income is different and more favorable to said businesses than the definition of gross income, hereinabove quoted in Paragraph III, which is applicable to plaintiff's business of radio broadcasting.

XV

That the definition of "gross income", hereinabove set forth in Paragraph III, is so vague and uncertain as to

render the Occupational Tax Act, as applied to plaintiff, inoperative and void; that plaintiff is entitled to know definitely and certainly the amount of tax which it is required to pay and the method of its ascertainment without the expense of litigation necessary to determine either; that different and vitally conflicting views will arise out of the interpretation of the language of said definition, particularly with reference to the meaning of the word "value" as to whether it imports "cost price", "sale price" or "net profit" on the sale of the services of the plaintiff in its business of radio broadcasting and particularly as to how to determine the value proceeding or accruing from the sale of services rendered by plaintiff in said business by reason of the investment of capital therein as distinguished from managerial skill employed therein for the reason that said definition purports to include only the value from the sale of such services actually received by reason of the investment of capital in the business.

That the rule by which the tax imposed on plaintiff is to be measured should be definite and certain and its definite-
[fol. 12] ness and certainty should appear from the provisions of the Act itself and not be the product of either litigation or compromise; and that by reason thereof the Occupational Tax Act, as applied to plaintiff, which necessitates the making of returns and payments and imposes severe penalties, hereinabove set forth, for the failure so to do, is unconstitutional and void, in that it violates and is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 3, Article I of the Constitution of the State of Washington, which state- that no person shall be deprived of property without due process of law.

XVI

That the defendants threaten to enforce the provisions of said Act and the penalties thereof against plaintiff; that in the event they do so plaintiff will be subjected to unjust and illegal exactions and onerous penalties; that the provisions of the Act, insofar as they are applied to and affect plaintiff, are wholly nugatory and void for the reasons hereinabove set forth; that the contention that the right of plaintiff to continue and engage in the business of radio broadcasting is dependent upon the payment of the taxes

imposed by the Act, will seriously embarrass it in the conduct of said business and subject it to harassment and annoyance and will necessitate a multiplicity of suits and prosecutions for the recovery of said monthly payments and penalties.

That such contention and threatened enforcement will embarrass plaintiff in the making of contracts with its patrons in that doubts will be cast upon the plaintiff's right to continue in business and to perform said contracts and pleas of illegality may be asserted by the contractees by reason of the fact that plaintiff has failed and refused to comply with the requirements of the Act and of the defendants attempting to enforce it; that this harassing and annoying burden will rest upon the plaintiff in the operation of its business despite the fact that said Act, as applied [fol. 13] to plaintiff in the conduct of its business, is in fact unconstitutional and void under the several provisions of the Constitution of the State of Washington and the Constitution of the United States hereinabove set forth; and that, until there has been a final and conclusive adjudication of the constitutionality or unconstitutionality of the Act, in the light of the constitutions of the United States and the State of Washington, as applied to plaintiff's business, the fact that it is upon the statute books and that the defendants are threatening or seeking to enforce it against plaintiff will create a condition of uncertainty and jeopardy in the conduct of the business of plaintiff, which will substantially and materially affect the same.

XVII

That amenable to the same provisions of the Occupational Tax Act, as are applicable to plaintiff, are many other individuals, partnerships or corporations operating radio stations situate in the State of Washington, but which are scattered throughout said State, and, unless in this or some other action brought for the same purpose there shall be a judicial determination of the constitutionality or unconstitutionality of the Act, as applied to such persons, in the light of the Constitutions of the United States and the State of Washington, these persons, in order to protect themselves from such an unlawful and void tax, will be compelled to each initiate and carry through his or its individual appeal to the courts for protection; that this

condition will necessarily result in a multiplicity of suits, and that plaintiff brings this action not only in its own behalf but also on behalf of all others similarly situated who may join it as plaintiffs in this action.

XVIII

That Section 13 of the Occupational Tax Act states that an injunction or restraining order may issue to restrain and enjoin the collection of any tax or penalty imposed thereunder, or any part thereof, upon the ground that the [fol. 14] assessment thereof is in violation of the Constitution of the United States or that of the State of Washington.

That by reason of the facts as herein alleged, plaintiff has no adequate remedy at law; and that, unless equitable relief by injunction, temporary and permanent, is granted by this court, plaintiff will be deprived of its lawful rights as herein alleged.

Wherefore, plaintiff prays judgment and decree of this court, as follows:

1. That defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and their agents, servants and employees, be forever enjoined and restrained from enforcing, as against this plaintiff, the said Occupational Tax Act, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

2. That, pending the determination of this suit, the defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, be required to show cause, on a day certain to be fixed by this court, why a temporary injunction should not issue against defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and against their agents, servants and employees, restraining and enjoining them from enforcing, as against this plaintiff, the said Occupational Tax Act, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from

imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

3. That plaintiff do have and recover its costs and disbursements herein.

[fol. 15] 4. That plaintiff have such other and further relief as to the court may seem just and proper.

Venables, Graham & Howe, Bernard Goodwin, Attorneys for Plaintiff.

Duly sworn to by Birt F. Fisher. Jurat omitted in printing.

[fol. 16] EXHIBIT "A" TO COMPLAINT

UNITED STATES OF AMERICA:

Federal Radio Commission

Radio Broadcasting Station License

File No: 5-R-B-63. Official No: 63. Call Letters: KOMO.

Subject to the provisions of the Radio Act of 1927, as amended, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee—Fisher's Blend Station, Inc.—is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning 3 am E.S.T. March 1, 1933, and ending 3 am, E.S.T. September 1, 1933.

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 920 Kc.

2. With power of 1 kilowatts, with an additional XXXX watts ((a) from local sunrise to local sunset only.
((b) for experimentation to determine whether interference results.
((c)

Height of Antenna (from ground or counterpoise to highest point of Antenna) xx meter.

Antenna current 8.5 Amperes. Antenna resistance 13.9 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters: KOMO

5. With the main studio of the station located at: Fourth Avenue and University Street, Seattle, Washington.

The apparatus hereinabove authorized to be used and operated is located at:

West Waterway, Harbor Island, Seattle, Washington, Lat. 47° 34′ 30″ North, Long. 122 21 24 West,

and is described as follows: Western Electric Type D-87737 Broadcasting Transmitter. Serial No. 117. Direct Crystal Control. Last radio stage: one 5 kilowatt vacuum tube (WE 228-A). Low level modulation. Maximum rated carrier power output 1 kilowatt. Antenna: Type Inverted "L"; length 12′; height 154′; direct ground; towers guyed wooden poles.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus can not be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

* * * * * * *

and described as follows:

* * * * * * *

[fol. 17] The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are

true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Radio Act of 1927 as amended. This license is subject to the right of use or control by the Government of the United States conferred by Section 6 of the Radio Act of 1927.

Dated this 10th day of February, 1933.

By the direction of the Federal Radio Commission.

James W. Baldwin, Secretary.

(Seal)

[fol. 18] EXHIBIT "B" TO COMPLAINT

UNITED STATES OF AMERICA:

Federal Radio Commission

Radio Broadcasting Station License

File No. 5-R-B-67. Official No. 67. Call Letters: KJR

Subject to the provisions of the Radio Act of 1927, as amended, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and, further subject to conditions set forth in this license, the Licensee—Fisher's Blend Station, Inc.—(Lessee)—is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning—3 am E.S.T. August 1, 1933, and ending—3 am E.S.T. February 1, 1934.

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 970 kc.

2. With power of 5 kilowatts, with an additional xxx

((a) from local sunrise to local sunset only.
((b) for experimentation to determine whether interference results.
((c)

Height of Antenna (from ground or counterpoise to highest point of Antenna)

xxxxx meters.

Antenna current xxx amperes.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters KJR

5. With the main studio of the station located at: Skinner Building, 1326 Fifth Ave., Seattle, Wash.

The apparatus hereinabove authorized to be used and operated is located at:

185th Street and 15th Avenue N.E., Lake Forest Park, near Seattle, Wash., Lat. 47° 47′ 15″ North, Long. 122 18 30 West,

and is described as follows: Composite—Broadcasting Transmitter. Direct Crystal control.

Last radio stage: two 10 kilowatt vacuum tubes (W.E. 220-B). Low level modulation. Maximum rated carrier power output 5 kilowatts.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus can not be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

* * * * * * *

[fol. 19] and described as:

* * * * * * *

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the

Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Radio Act of 1927 as amended. This license is subject to the right of use or control by the Government of the United States conferred by Section 6 of the Radio Act of 1927.

Dated this 11th day of July, 1933.

By direction of the Federal Radio Commission.

John B. Reynolds, Acting Secretary. (Seal.)

cgb.

[fol. 20] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

INJUNCTION PENDENTE LITE—Filed Sept. 14, 1933

This matter coming on duly and regularly for hearing on the 15th day of September, 1933, pursuant to that certain Order to Show Cause heretofore issued herein on the 28th day of August, 1933, returnable on the 15th day of September, 1933, at 9:30 A.M. before this court, the plaintiff appearing by its attorneys, Venables, Graham & Howe and Bernard Goodwin, and defendants by their attorneys, G. W. Hamilton, Attorney General, and E. P. Donnelly, Assistant Attorney General, and the court being fully advised in the premises,

Now therefore, upon stipulation of the parties on file herein,

It is hereby ordered that that certain Restraining Order, heretofore issued herein on the 28th day of August, 1933, restraining and enjoining defendants from enforcing, as against the plaintiff, the Occupational Tax Act, Chapter 191 of the Laws of 1933 of the State of Washington, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff, be continued in full force and effect pendente lite and that said defendants, individually and as the Tax Commission of the State of [fol. 21] Washington, and any associate commissioner, and their agents, servants and employees, be and they are hereby enjoined and restrained, during the pendency of this action, or until the further order of this court herein, from enforcing, as against plaintiff, the said Occupational Tax Act, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

This Injunction Pendente Lite will be issued by the Clerk of this Court, pursuant to the stipulation of the parties on file herein and the consent of the General Casualty Company of America, surety on plaintiff's Temporary Restraining Order bond in the sum of $500.00 on file herein, to have said bond remain in full force and effect to pay all damages and costs which may accrue to defendants by reason of said Injunction Pendente Lite to the extent of said sum; and that no other or additional bonds shall be required.

Done in open court this 14 day of September, 1933.

D. F. Wright, Judge.

Presented by: E. P. Donnelly, Asst. Atty. Genl.

[fol. 22] In Superior Court of Thurston County

[Title omitted]

Demurrer—Filed Oct. 10, 1933

Come now defendants and demur to plaintiff's complaint in this case on the ground and for the reason that the same

does not contain facts sufficient to constitute a cause for action.

G. W. Hamilton, Attorney General. E. P. Donnelly, Assistant Attorney General.

Service acknowledged Oct. 7, 1933. Venables, Graham & Howe and Bernard Goodwin.

[File endorsement omitted.]

[fol. 23] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

STIPULATION AS TO ADDITIONAL FACTS—Filed July 10, 1934

It is hereby stipulated between the above named plaintiff, by its attorneys, Venables, Graham & Howe, and the above named defendants, by their attorneys, G. W. Hamilton, attorney general for the State of Washington, and E. P. Donnelly, assistant attorney general, as follows:

I.

That plaintiff's complaint shall be amended by this stipulation to include therein the following paragraph, which shall be paragraph IX-½ of said amended complaint:

"That the plaintiff, in engaging in the business of radio broadcasting as herein described, sells time to its customers at a charge of so much per minute of the time consumed. Plaintiff is required by the regulations of the Federal Radio Commission to occupy all time allot-ed to it in broadcasting and when not broadcasting for one of its customers, as above described, is required to furnish broadcasting programs and does so in the following way:

(a) By broadcasting a program emanating from its own studios.

(b) By purchasing a program broadcast by one of the chain systems and brought to plaintiff's studios by wire.

Such program is generally known as a sustaining pro-
[fol. 24] gram.

That the revenues of the plaintiff arising from the business of radio broadcasting come from the following sources:

(a) From the National Broadcasting Company or other chain broadcasting companies for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, originating outside of the State of Washington and transmitted to plaintiff's broadcasting station by wire.

(b) From persons, firms or corporations, for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising and announcements originating in plaintiff's studios or transmitted to plaintiff's studios such programs and announcements being broadcast only by plaintiff's stations.

(c) From persons, firms or corporations for use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, which are simultaneously broadcast from plaintiff's stations and transmitted by wire to other radio stations located within the State of Washington, for broadcast from such stations.

(d) Same as (c) except the word 'within' changed to 'without'.

That a large number of persons, the exact number of which is unknown to either party, listen to the broadcasts from plaintiff's stations; that many such listeners reside out of the State of Washington, but a substantial portion of such are resident within the State of Washington."

[fol. 25]

II

That the demurrer interposed to the original complaint shall be deemed to be interposed to the complaint as so amended, and noted and submitted for hearing by the court at the earliest convenience of the parties.

Dated this 5th day of July, 1934.

Fisher's Blend Station, Inc., by Venables, Graham & Howe, its Attorneys. The Tax Commission of the State of Washington and Thomas S. Hedges and T. M. Jenner, Members of said Commission, by G. W. Hamilton, Atty. Genl., E. P. Donnelly, Asst.

[fol. 26] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15138

FISHER'S BLEND STATION, INC., a Corporation, Plaintiff,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, Members of Said Commission, Defendants

ORDER OVERRULING DEMURRER AND JUDGMENT AND DECREE GRANTING PERMANENT INJUNCTION—Filed July 27, 1934

This cause having come on to be heard before the court on 24th day of Oct. 1934, upon the demurrer of defendants and upon the stipulation of counsel on file herein and stipulation made in open court, as hereinafter noted, the Plaintiff being represented by Venables, Graham & Howe, and the Defendants, The Tax Commission of the State of Washington and Thomas S. Hedges and T. M. Jenner, members of said commission, appearing by the Honorable G. W. Hamilton, Attorney General for the State of Washington, and E. P. Donnelly, Assistant Attorney General, and Alfred Harsch, Attorney for said Commission, and it appearing that the Plaintiff, having heretofore filed herein its verified complaint, and the Defendants having appeared and filed demurrer thereto, which demurrer was argued, considered and overruled on the 1st day of December, 1933, and thereafter, on the 10th day of July, 1934, counsel for the respective parties filed herein their stipulation in writing providing that Plaintiff's complaint be amended thereby to include, as paragraph XI½ of said complaint, a paragraph setting forth certain additional facts in said stipulation set [fol. 27] forth, that the demurrer interposed to the original complaint be deemed interposed to the complaint as so amended, and said demurrer to the amended complaint having come on for hearing on this date and been submitted to the court for decision, and the court having considered the same, and being fully advised overruled said demurrer to the amended complaint, and counsel for the Defendants having thereupon announced in open court that they elected

to stand upon their demurrer and refused to plead further, and the parties having stipulated in open court that said cause might be submitted to the court for final determination upon the allegations of the complaint as an agreed statement of facts, and the court having heard the argument of counsel, and being fully advised in the premises,

Now, therefore, it is ordered, adjudged and decreed:

That the defendants, and each of them, and any associate Commissioner who may hereafter be appointed to said Tax Commission their successors, agents and employes, be and they are hereby permanently enjoined and restrained from enforcing as against the Plaintiff herein the Occupational Tax Act, Chapter 191 of the Laws of 1933 of the State of Washington, or any portion thereof, from claiming taxes thereunder as due or to become due from the Plaintiff, and from imposing any penalty on the Plaintiff, and from attempting, directly or indirectly to collect any tax thereunder from the Plaintiff.

That that certain bond of injunction filed herein by the Plaintiff upon its application for a temporary restraining order herein and which was continued in force pendente lite by an order entered herein on the 14th day of September, 1933, wherein the plaintiff herein, Fisher's Blend Station, Inc., a corporation, is the principal, and the General Casualty Company of America, is the surety, being bond num-
[fol. 28] ber 5163, be and the same is hereby fully exonerated.

That the plaintiff do have and recover its costs and disbursements herein to be taxed.

To all of which Defendants except and their exceptions are allowed.

Done in open Court this 27th day of July, 1934.

D. F. Wright, Judge.

Presented by —— ——.

[fol. 29] In Superior Court of Thurston County

[Title omitted]

Notice of Appeal—Filed Aug. 7, 1934

To Fisher's Blend Station, Inc., a corporation, plaintiff, and to Messrs. Venables, Graham & Howe, its attorneys:

You, and each of you, will please take notice that the defendants above named hereby appeal to the Supreme Court

of the State of Washington from the order over-ruling demurrer and judgment and decree granting permanent injunction entered in this cause and court on the 27th day of July, 1934, and from each and every part of said final order and decree.

Dated at Olympia, Washington, this 1st day of August, 1934.

G. W. Hamilton, Attorney General. E. P. Donnelly, Assistant Attorney General.

Copy of within notice of appeal received and due and regular service thereof admitted this 2nd day of August, 1934.

Venables, Graham & Howe, Attorneys for Plaintiff & George Guttormsen.

[File endorsement omitted.]

[fol. 30] IN SUPREME COURT OF WASHINGTON

Department One

No. 25302

FISHER'S BLEND STATION, INC., a Corporation, Respondent,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and THOMAS S. HEDGES and T. M. JENNER, Members of Said Commission, Appellants

OPINION—Filed May 27, 1935

Plaintiff, a domestic corporation, operates two radio stations in the city of Seattle, and instituted this action for the purpose of enjoining the defendants, the members of the tax commission of the State of Washington, from enforcing against plaintiff an occupation tax, pursuant to Laws of 1933, chapter 191 (Rem. Rev. Stat., Sec. 8326-1 to 8326-30, inc.). In its complaint, plaintiff alleged that it was engaged solely in the business of radio broadcasting; that this occupation constitutes interstate commerce; and that the tax sought to be levied against plaintiff amounting under the

statute to one per cent of plaintiff's gross income, constitutes an illegal and unconstitutional burden upon interstate commerce, and that plaintiff is not liable to pay the same.

Plaintiff also alleged its operation of the two stations—one as owner, the other as lessee—pursuant to licenses issued by the Federal Radio Commission, subject to use and control by the Federal Government, in accordance with Federal statutes, and under call letters, radio frequencies and watt power as fixed by the Federal Commission. Plaintiff further alleged that its two radio stations were broadcasting commercially, covering a designated area embracing [fol. 31] the state of Washington and several other states of the Union, besides certain parts of the Dominion of Canada and an area of the Pacific ocean; that such broadcasting from plaintiff's stations has been continuous and effective, and constitutes a valuable and remunerative business; that the facilities of plaintiff's stations are greatly in demand, the stations forming links in a system of national and Pacific coast broadcasting; and that the value of the operating systems of the two stations is approximately six hundred thousand dollars.

Defendants demurred to plaintiff's complaint, and, upon their demurrer being overruled, the complaint was amended by a stipulation containing certain agreed statements of fact. Defendants renewed their demurrer to the amended complaint, and, upon their second demurrer being overruled, elected not to plead further, whereupon a decree was entered granting the prayer of plaintiff's complaint and permanently enjoining defendants from levying the tax against plaintiff, from which decree defendants have appealed.

Respondent contends that it is engaged solely in interstate commerce, and that a tax upon the gross receipts derived from radio broadcasting amounts to a tax upon interstate commerce and cannot be collected, the same being in contravention of the commerce clause of the constitution of the United States.

Appellants assign error upon the overruling of their demurrer, and upon the entry of a decree permanently enjoining them from levying a tax upon respondent in an amount equal to one per cent of the gross income received by respondent from its activities as operator of the two radio stations.

By Sec. 5 of the act, it is provided that, in computing the amount of the tax, there shall be excepted from gross proceeds such portion thereof as may be derived from business which the state of Washington is, by the constitution [fol. 32] or laws of the United States, prohibited from taxing. Appellants concede that gross income derived from interstate business cannot be considered in computing the tax. As respondent has no income save from its two stations, the question is squarely presented: Is such a tax as is here under attack, when levied upon the gross income of radio broadcasting stations, a burden upon interstate commerce, or does broadcasting, for the purposes of the statute above referred to, constitute intrastate business, upon which the state is entitled to receive the tax provided for by statute?

It is, of course, manifest that broadcasting stations and the operation thereof, whether commercial or private, must be under the control of the Federal government. The electromagnetic waves released from such stations pass through space to varying distances, at approximately the speed of light, registering here and there as they go upon different receiving appliances properly attuned to transmute the waves into audible sound. The ether which surrounds us and serves as a connecting medium between the broadcasting mechanism and the receiving point recognizes no state or national boundary, and, indeed, we know not whether the activity of the magetic vibrations is limited merely to the atmosphere which surrounds our planet. It must be admitted that in their activities the waves which are intentionally released by broadcasting stations in the course of their business are, in their field of activities, essentially interstate and international. Radio broadcasting, then, whether commercial or private, from its very nature must be under the control of the Federal authorities, and the Congress, undoubtedly, has the constitutional prerogative to control the same. In time of war or calamity the activities connected with radio must be, on the one hand, at the service of the government for its purposes, and, on the other, used by private individuals only as may be permitted under [fol. 33] regulations necessary to preserve the public safety. Federal control of broadcasting is essential, also, in order that stations may operate without undue interference from other stations, and that lanes and zones may be carved out

of the ether, thereby allowing each station to function to a maximum of advantage and with a minimum of interference. It must be conceded that, once the magnetic waves are released from a broadcasting station, they become an interstate and international activity, or energy, and in the present state of the art are, generally speaking, subject to no human control, save, of course, that they can be interfered with or blanketed by other and stronger waves released at strategic points.

As respondent is attacking the constitutionality of a revenue law, the burden rests quite heavily upon it to establish the facts upon which it bases its claim that the statute is, as to respondent, invalid. Weaver v. Palmer Bros. Co., 270 U. S. 402 (410); Detroit International Bridge Co. v. Corporation Tax Appeal Board, 287 U. S. 295: St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350; Interstate Busses Corporation v. Holyoke S. R. Co., 273 U. S. 45. Statutes providing for the raising of revenue required by the state in carrying on its functions are vital to its welfare, and a person, natural or artificial, should not be declared exempt from the payment of a tax required of business generally, unless it clearly appears that the constitution and laws of the United States (or of the state) require such exemption.

Referring to the tax imposed by the legislature on commercial activities, from which respondent claims that it is exempt, this court, in the case of State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91, said:

"These commercial businesses are peculiarly dependent upon the state for protection in order that they may be carried on successfully, and they, more than all others, are responsible for, and receive the benefit of, that which the state expends in maintaining peace and order and the safety of private property."

[fol. 34] The tax levied is for revenue, not regulation. Pacific Tel. & Tel. Co. v. Seattle, 172, Wash. 649, 21 P. (2d) 721.

The statute here in question does not levy a license tax, nor a tax based upon corporate stock, but imposes a tax, by way of an excise, upon business activities or functions, the tax to be computed by figuring a percentage of the gross income received by the taxpayer. Payment of the tax is not a prerequisite to the right to engage in business, save

in so far as process to enforce payment of a delinquent tax might interfere with the taxpayer's affairs. In passing upon such questions as are here presented, courts pay less attention to form than to substance, and also consider the operation of a law as applied and enforced by the state authorities.

It must now be considered whether or not respondent's business is, from the standpoint of the tax sought herein to be enjoined, interstate, or whether, for the purposes of the statute in question, it should be held to be an intrastate business and subject to payment of the tax. Of course, a business may be, to some extent, interstate in its nature and still not come within the purview of the commerce clause of the Federal constitution. Many news papers circulate beyond state lines, carrying their advertising indiscriminately to all readers, but would scarcely, for that reason, be classified as engaged in interstate commerce. It has been held that a business consisting of representing merchants in placing with publishers advertisements in magazines which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of the magazines themselves be such commerce. Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436. An advertising billboard might be so placed as to carry its message to persons beyond the boundary of the state in which it was located, but [fol. 35] the maintaining of such an advertising medium would scarcely be classified as interstate business. There are other similar instances. Because of the many recent taxing statutes, whereby the several states seek to raise necessary additional revenue, the question of what constitutes interstate commerce, considered from the standpoint of such revenue acts, has been of late years presented frequently and from new angles. It must always be remembered that the regulation by a state of an interstate business is one thing; the raising of revenue by a state by levying taxes is another and, to some extent at least, a different thing. We are not here concerned with the levying of an ordinary property tax. Respondent does not question any tax levied by the state of Washington upon its tangible property, but contends that, by seeking to collect a tax based upon the gross revenue which it receives from its broadcasting station, the state is laying a burden upon interstate commerce

and seeking to exact a payment which it has no right to demand.

It is not here contended that respondent's business constitutes a governmental agency, and for that reason cannot be taxed. That question has been suggested in other cases, but is not here urged, respondent relying solely upon the proposition that the tax to which it objects is a burden upon interstate commerce. Respondent's business necessarily falls into two classes—broadcasting for which it receives compensation, and that for which it receives nothing. The tax here in question is, of course, no burden upon respondent's business, in so far as its uncompensated activities are concerned. No question is here presented, then, exactly analogous to cases in which the right of the state, or a subordinate agency thereof, to demand payment of a license fee as a prerequisite either to operating a broadcasting station or owning a receiving set, was considered. [fol. 36] Neither is the act under attack any burden upon the use of respondent's stations, either by itself for its own purposes, or by those to whom the courtesy of the station is donated. The tax which appellants seek to collect is a direct burden upon the business of respondent only in so far as it derives an income from leasing its stations to others for compensation.

The Supreme Court of the United States has held that a state tax which only indirectly or remotely burdens interstate commerce is not obnoxious to the constitutional provision relied upon by respondent. Federal Compress etc. Co. v. McLean, 291 U. S. 17; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249; Hall v. Geiger-Jones Co., 242 U. S. 539. In this connection, the Supreme Court of the United States, in the case of U. S. Fidelity & Guaranty Co. v. Kentucky, 231 U. S. 394, upheld an excise or privilege tax levied by the state, the tax being resisted upon the ground that it was a direct interference with interstate commerce. In the course of its opinion, the court said:

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

Respondent's complaint contains no allegation to the effect that as a part of its business it transmits special point

to point messages. This branch of radio service, therefore, need not be considered. Neither does respondent contend that its facilities are leased to anyone for the purpose of conducting scientific experiments. It clearly appears from the complaint that respondent's stations are used only for commercial broadcasting, and that branch of the art is the only one with which we are here concerned.

A very similar question was before the supreme court of Georgia in the case of City of Atlanta v. Oglethorpe Univer- [fol. 37] sity, 178 Ga. 379, 173 S. E. 110. In the case cited, the plaintiff sought an injunction against the enforcement by the city of an ordinance providing for the payment to the city of a business license required by the city from those following certain occupations or businesses. The plaintiff contended, inter alia, that in conducting a broadcasting station, it was engaged in interstate commerce, and that the city could not exact payment of a business license based upon the fact that plaintiff owned and operated a broadcasting station. The court held that broadcasting was not an interstate business, even though the magnetic waves discharged from plaintiff's station passed beyond the boundaries of Georgia. The court considered that the broadcasting business was almost altogether intrastate, and that its income was received from what should be called intrastate business. The court properly considered the basic facts of the situation, rather than those which were incidental thereto.

The Supreme Court of the United States, in the case of Utah Power & Light Co. v. Pfost, 286 U. S. 165, held valid an act of the legislature of Idaho levying a license tax on plants for the production of electrical energy as levied against a corporation which maintained a power plant in Idaho for the generation of electricity, most of the product being disposed of in the state of Utah. The court held that the tax was not a burden upon interstate commerce, saying, in the course of its opinion:

"We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the

manufacture. Cornell v. Coyne, 192 U. S. 418, 428-429. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E. C. Knight Co., 156 U. S. 1, 12.' ''

[fol. 38] It has been held that the state may levy a tax based upon the intrastate gross receipts of corporations selling natural gas, although the product was brought without interruption from its source in another state to the place of consumption in the state levying the tax. It was held that the reduction of the pressure under which the gas moved from a higher to a lower rate as the gas moved in the local mains was equivalent to the opening of an original package, and that, therefore, the distribution of the gas to the consumers was essentially a local business, and that the tax did not burden interstate commerce. East Ohio Gas Co. v. Tax Commission, 283 U. S. 465. It is, of course, true that the carrying of gas or oil through a state constitutes interstate commerce. Ozark Pipe Line Corporation v. Monier, 266 U. S. 555. But in our opinion the principal involved in the case cited and other authorities to the same effect is not controlling here.

The cases cited are important as indicating that, in passing upon the validity of state statutes levying taxes, the Supreme Court of the United States gives the states the benefit of the doubt and holds the acts valid unless they beyond question directly burden interstate commerce.

In the case of Henderson Bridge Co. v. Kentucky, 166 U. S. 150, it appeared that the bridge company, a Kentucky corporation, owned railroad trackage and a bridge between the states of Kentucky and Indiana. It was held that a tax levied by the state of Kentucky upon the corporation's franchise was valid. The court distinguished between the levying of such a tax, citing Central Pacific Railroad v. California, 162 U. S. 91, and the attempted regulation by the state of tolls for use of the interstate bridge. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204. Considering the matter at issue, the court summed up the question as follows:

[fol. 39] "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by persons and corporations which paid the bridge company tolls for the privilege of using the

bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in Erie Railroad v. Pennsylvania, 158 U. S. 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public mantenance.' The only franchises treated here as the subject of taxation were those granted by the state of Kentucky. So far as the state of Indiana could be said to have conferred any franchise upon the company, it was a franchise that inhered in that portion of the structure that was within the state of Indiana, the value of which was not included in the tax complained of."

In the recent case of Detroit International Bridge Co. v. Corporation Tax Appeal Board, 79 Sup. Ct. Adv. Opinions 337, the court upheld the tax sought to be levied by the state of Michigan against the bridge company for the privilege of exercising its franchise and of transacting its business within the state. The tax was levied by way of an annual fee upon each dollar of corporation paid-up capital and surplus; property or capital located without the state to be excluded, as well as such of the capital as was represented by property exclusively used in interstate commerce. The tax was characterized by the supreme court of Michigan as "a privilege tax imposed as an incident to the right to be a corporation and exercise corporate functions by means of paid-up capital and surplus." The powers of the corporation were by its charter limited to the ownership and operation of a highway bridge crossing the Detroit river from Detroit, Michigan, to Sandwich, Ontario, operated as a toll bridge, from which tolls the corporation derived its sole income. The supreme court of Michigan upheld the validity of the tax as against the bridge company, which, on appeal to the [fol. 40] Supreme Court of the United States, argued that, as its only power under its charter was to engage in foreign commerce, a state tax for the privilege of so doing

would burden such commerce and offend the Federal constitution. It appeared that the bridge company itself conveyed no persons or goods across the international boundary; it collected toll from persons using the bridge; the company merely provided "an instrumentality which others may use in conducting foreign commerce." The Supreme Court, quoting with approval from its opinion in the case of Henderson Bridge Co. v. Kentucky, supra, held that the owner of an interstate bridge collecting compensation from persons using the same was not engaged in interstate commerce, and affirmed the decree of the supreme court of Michigan upholding the validity of the tax.

Appellants argue here that, if the owner of an international or interstate bridge, who rents that facility to persons engaged in interstate commerce, is not itself engaged in such commerce, it should be held that the owner of a broadcasting station, who rents to others the facilities thereby afforded, should not be held, for the purposes of the statute now before us, to be engaged in interstate commerce. The surrounding ether may be likened to the bridge and, while respondent does not lease the ether, it does lease a device which enables its patron to use the ether as a "bridge" or medium of communication between the station and such receiving appliances as may be so attuned as to reproduce the message released through space.

Respondent seeks to distinguish the Detroit bridge case by calling attention to the fact that the tax there in question was levied upon the privilege of conducting business but was not levied upon the business itself. There is, of course, that difference between the question decided in the case cited and that which must be determined here. The Supreme Court [fol. 41] of the United States, however, has said that the ownership of an international bridge and the collection of tolls from persons who use the same does not constitute interstate commerce. While, of course, the language of the decision must be limited to the question which was presented, and the case cited is, therefore, not controlling here, the reasoning is most persuasive, and the language used applies with great force to the situation here presented.

Respondent cites several authorities which clearly hold that a statute purporting to levy an occupation tax upon an interstate business constitutes a burden upon interstate commerce and is obnoxious to the Federal constitution.

Sprout v. City of South Bend, 277 U. S. 163; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326. Respondent also calls attention to the fact that the tax which was sustained by the Supreme Court of the United States in the case of Henderson Bridge Co. v. Kentucky, supra, was a property tax, while the tax here in question is not a property, but an occupation, tax. State ex rel. Stiner v. Yelle, supra.

Respondent relies upon the case of Van Dusen v. Department of Labor and Industries, 158 Wash. 414, 290 Pac. 803, in which it was held that a workman engaged in removing a telephone switchboard, located in a room forming part of the plant of a broadcasting station, was engaged in interstate commerce, and was not within the protection of the industrial insurance law. The telephone switchboard was an integral part of the apparatus used in the station in the course of its broadcasting operations, and was being removed for the purpose of installing an ice machine which was to be used in cooling water for use in connection with the radio tubes. It was held that the removal of the switchboard was "a work so closely related to interstate com-[fol. 42] merce, in which the station was engaged, as to be a part of such commerce."

Respondent also relies upon the case of Station WBT v. Poulnot, 46 F. (2d) 671, in which the United States district court enjoined a sheriff from enforcing collection of a tax sought to be collected pursuant to an act of the legislature of South Carolina requiring a payment by each owner of a radio receiving set, the amount of the tax varying somewhat upon the nature of the set owned. It was not sought to levy the tax as a part of the general system for the taxation of property, the law evidently contemplating the collection of a license tax for the privilege of using the device. The court held that a radio receiving set is an instrument used in interstate commerce, and that a state could not require payment of a license fee by the owner of such a set as a prerequisite to use thereof. The court also held that the law could not be sustained as a matter of local regulation, as that sphere had been preempted by the Federal government.

The converse of the proposition last discussed is found in the opinion of the United States district court for a Kentucky district in the case of Whitehurst v. Grimes, 21 F.

(2d) 787. This was an action brought to restrain a chief of police from enforcing collection of a license which a municipal ordinance required to be paid by any person operating a broadcasting station. The court held that the business of radio broadcasting was in its nature interstate, that the field of regulation and control of such stations had been preempted by the United States, and that the municipal ordinance was void, as an interference with interstate commerce.

It cannot be denied that radio broadcasting is, in its sphere of activity, essentially interstate and international. It has been held in the cases above referred to, probably [fol. 43] upon sound reason, that the use by a person of his own station constitutes interstate commerce, as does the setting up and operation of a receiving set. In the Van Dusen case, supra, this case properly held that a workman engaged, as was Mr. Van Dusen, in making alterations in a broadcasting station was engaged in interstate commerce. That case would be authority for a holding that a workman employed in building the bridge between Detroit and Canada would also have been engaged in international commerce. Such a bridge is undoubtedly a facility used in connection with foreign commerce, but the Supreme Court of the United States has held that the owner of the structure, in charging tolls for its use, is not engaged in such a business.

It seems clear that the Supreme Court of the United States, while protecting to the fullest extent the right of the Federal government under the constitution to regulate interstate and international commerce, is, on the other hand, inclined to hold that the respective states, is so far as their right to raise revenue by taxation is concerned, should be accorded as liberal a construction of the Federal constitution and laws as is consistent with the preservation of every right necessary to enable the Congress to protect interstate commerce against interference. A discriminatory tax would undoubtedly be held to constitute such interference, but, from the standpoint of justice and equity, and a proper support of government, every reason exists for as general a distribution of a fair burden of taxation as can possibly be accomplished.

In the case of Sprout v. City of South Bend, supra, the Supreme Court of the United States held invalid a city ordi-

nance requiring payment of a license fee by the operator of a motor bus carrying passengers between South Bend and a point in Michigan. The operator of the stage was, of [fol. 44] course, engaged in interstate commerce, himself carrying passengers from one state to another, and the ordinance was, naturally, held void. In the earlier case of Philadelphia & Southern Steamship Co. v. Pennsylvania, supra, the same court held that a state statute levying a tax upon the receipts of a corporation engaged in interstate and foreign commerce was obnoxious to the Federal constitution. In these and other similar cases it was, of course, unquestionably the fact that the person resisting the levy of the tax was actually engaged in interstate commerce.

In so far as the conduct of its business affairs by respondent is concerned, it is all purely intrastate. Its plants are entirely within the state of Washington; its contracts provide only for the use of its stations and the recognized facilities thereof, including their power to project electromagnetic waves. Respondent completes its contracts with its patrons when it turns over its stations to them or to their agents, and it is none of respondent's concern, as long as the stations function properly, where or by whom the waves or vibrations which it causes to be released are received and transmuted into sound. Respondent completes its contract and earns its compensation regardless of whether five stations or five thousand receive the message. In this connection, the holding of the supreme court of Georgia in the case of City of Atlanta v. Oglethorpe University, supra, is in point, and we agree with that court in holding that, as a practical proposition, broadcasting similar to that with which we are here concerned is an intrastate business, considered in connection with such a tax as is here in question. As to whether or not a state could exact a license fee for the privilege of operating a broadcasting station, we express no opinion.

The tax which is here sought to be restrained is an excise or occupation tax, paid very generally by persons engaged [fol. 45] in business in this state. It is not contended that the tax, in so far as the same affects respondent, is discriminatory, capricious or unfair. Respondent relies exclusively upon a supposed constitutional exemption from the payment of such a tax. Assuming that the state could not exact a license fee for the privilege of operating a broad-

casting station, as the use thereof by the owner himself, or by his representative, might well be held to be interstate commerce (clearly a point to point broadcast, the points being in two different states, would constitute interstate business); assuming further that the state could not exact a fee by way of a license for the privilege of owning a receiving set or device, as such an appliance in most instances would be used in connection with broadcasts released in other states, nevertheless, bearing in mind the principles above stated and the authorities cited, we hold that the state may levy the tax here in question, computed upon the gross amount which respondent receives for the rental of its facilities. In so far as respondent itself uses its stations, it pays no tax, and in so far as it allows others to use them for compensation, it is not engaged in interstate commerce. Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra.

If it be that the tax does affect interstate commerce, it does so merely incidentally, and does not constitute a burden thereon to such an extent as to require a holding that the tax is void as to respondent as obnoxious to the commerce clause of the Federal constitution.

The judgment appealed from is reversed, with instructions to the trial court to sustain appellant's demurrer.

Beals, J.

We concure: Tolman, J. Geraghty, J. Main, J.

DISSENTING OPINION

MILLARD, C. J., dissenting:

I am convinced that radio broadcasting is interstate commerce, therefore the state may not levy an occupation tax against respondent. The judgment should be affirmed.

Millard, C. J.

[fol. 46] IN SUPREME COURT OF WASHINGTON

Department One

No. 25302

FISHER'S BLEND STATION, INC., Respondent,

v.

THE STATE TAX COMMISSION ET AL., Appellants

OPINION AMENDING OPINION—Filed Oct. 17, 1935

Per CURIAM:

Our attention having been called to the fact that the parties to this proceeding in effect agreed that the matter should be submitted to the trial court as upon an agreed statement of facts, and that, consequently, the judgment of the trial court was rendered upon the merits, the opinion heretofore rendered herein (82 Wash. Dec. 123) is hereby amended as follows:

The last paragraph of the opinion, which reads: "The judgment appealed from is reversed, with instructions to the trial court to sustain appellants' demurrer," will be stricken and there is hereby substituted in its place the following: The judgment appealed from is reversed, with instructions to the trial court to enter judgment in appellants' favor denying respondent any relief and dismissing the action.

[fol. 47] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—Filed Sept. 13, 1935

The court having considered the petition of respondent and the petitions of various amici curiae for a rehearing herein;

It is ordered that the petitions be and they hereby are denied.

Dated this 13th day of September, 1935.

By the Court.

John F. Main, Acting Chief Justice.

[File endorsement omitted.]

[fol. 48] IN SUPREME COURT OF WASHINGTON

No. 25302

Thurston County No. 15138

FISHER'S BLEND STATION, INC., a Corporation, Respondent,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and THOMAS S. HEDGES, et al., Members of Said Commission, Appellants

JUDGMENT—October 19, 1935

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 19th day of October A. D. 1935, on motion of G. W. Hamilton, Attorney General, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with instructions to the trial Court to enter judgment in appellants' favor denying respondent any relief and dismissing the action and that the said Tax Commission of the State of Washington, have and recover of and from the said Fisher's Blend Station, Inc., the costs of this action taxed and allowed at Fifty Five and 05/100 ($55.05) Dollars, and that execution issue therefor.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Journal 33. Supreme Court of Washington. Page 24.

[fol. 49] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Nov. 26, 1935

The petitioner and appellant assign the following Errors in the record and proceedings in this cause:

(1) The Supreme Court of the State of Washington by its judgment erred in reversing the decree of the Superior

Court for Thurston County which granted a permanent injunction to appellant, and against appellees, and adjudicated that the statute, to wit, the Occupation Tax Act (Chap. 191, Laws of 1933), the enforcement of which, against appellant, was enjoined, contravenes and is repugnant to Section 8, Article I, (the Commerce Clause) of the Constitution of the United States in that as applied to appellant it is a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce and amounts to a direct burden thereon.

(2) The Supreme Court of the State of Washington erred in entering judgment in favor of appellees denying appellant any relief and dismissing the action and in failing to enter judgment that appellant is entitled to the relief sued for in that the enforcement against appellant of the statute of the State of Washington sought to be enjoined, to wit, the Occupation Tax Act, contravenes and is repugnant to Section 8, Article I, the commerce clause, of the Constitu- [fols. 50-59] tion of the United States, in that said statute, so enforced, is a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce and amounts to a direct burden thereon.

(3) The Supreme Court of the State of Washington erred in holding that appellant, in the conduct of its business of radio broadcasting, is engaged in intrastate and not interstate commerce for the reason that the record shows appellant is engaged solely in interstate commerce and such holding has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by stipulation of the parties.

(4) The Supreme Court of the State of Washington erred in holding that appellant leases or rents its facilities and "turns over" its stations for compensation to its patrons or their agents, for the reason that such holding has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by written stipulation of the parties.

(5) The Supreme Court of the State of Washington erred in holding that the Act in question as applied to appellant does not affect interstate commerce except incidentally and that it does not constitute a burden thereon and in failing to hold that the enforcement of the Occupation Tax Act

against appellant constitutes a direct burden on interstate commerce, as defined by and in accordance with the decisions of the Supreme Court of the United States.

Wherefore, on account of the Errors hereinabove assigned, petitioner prays that the said judgment of the Supreme Court of the State of Washington, dated the 19th day of October, 1935, in the above entitled cause be reversed and judgment be rendered in favor of this appellant.

Dated this 26th day of November, 1935.

R. J. Venables, Donald G. Graham, James B. Howe, Attorneys for Appellant.

[fol. 60] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 26, 1935

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Fisher's Blend Station, Inc., a corporation, respectfully shows:

That your petitioner is the appellant in the above entitled cause.

That on August 28, 1933, your petitioner filed its complaint against the appellees above named in the Superior Court of the State of Washington for Thurston County, alleging that a statute of the State of Washington, to-wit, the Occupational Tax Act (Chapter 191, Laws of 1933, being Sections 8326-1 to 8326-30 inclusive, of Remington's Compiled Statutes of Washington), which purported to tax the gross income of radio broadcasting stations, was repug-
[fol. 61] nant to and in conflict with Section 8, Article I, of the Constitution of the United States, being the so-called commerce clause of said Constitution. Equitable grounds were alleged for and the issuance of an injunction was requested against the appellees above named, enjoining and restraining them from enforcing said Occupational Tax Act against petitioner. That an injunction pendente lite

was granted by said Superior Court, and thereafter a demurrer was filed and, after consideration, was overruled by said Superior Court; thereupon, the parties stipulated that the cause be submitted to said Superior Court for final determination upon the allegations of the complaint, as amended, as an agreed statement of facts, and thereafter said Superior Court entered its order permanently enjoining and restraining the appellees from enforcing, as against petitioner, said Occupational Tax Act, and from claiming or collecting any taxes thereunder from petitioner; an appeal from said final order granting a permanent injunction was taken to the Supreme Court of the State of Washington, and said Supreme Court rendered its opinion on said appeal reversing the judgment of the lower court and instructing it to enter judgment in appellant's favor, denying petitioner any relief and dismissing the action. The opinion of said Supreme Court in its entirety dealt with the question of the validity of said statute in respect to the Constitution of the United States, and in effect found that said statute, as enforced against the petitioner, was not in conflict with or repugnant to the said commerce clause of the Constitution of the United States, and that its said enforcement did not constitute a burden upon interstate commerce. Within the time allowed by law petitioner filed its petition for rehearing, and thereafter said petition for rehearing was denied, and the final judgment of said Supreme Court denying the petitioner any relief and ordering a dismissal of the action was entered on October 19, 1935.

That the Supreme Court of the State of Washington is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity [fol. 62] of a statute on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Section 8, Article I, of the Constitution of the United States.

That, therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237(a) of the Judicial

Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Washington, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Dated this 26th day of November, 1935.

R. J. Venables, Donald G. Graham, James B. Howe,
Attorneys for Petitioner.

[fol. 63] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed Nov. 26, 1935

The petition of Fisher's Blend Station, Inc., a corporation, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as

provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 19th day of October, 1935, of the Supreme Court of the State of Washington, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said court, a true [fol. 64] copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of one thousand and no/100 ($1000.00) Dollars, that said appellant shall prosecute said appeal to effect and answer all costs if it fails to make its plea good.

Dated this 26th day of November, 1935.

William J. Millard, Chief Justice of the Supreme Court of the State of Washington.

[fols. 65-67] Bond on appeal for $1,000.00, approved and filed Nov. 26, 1935, omitted in printing.

[fols. 68-71] Citation, in usual form, showing service on G. W. Hamilton and E. P. Donnelly, filed Nov. 26, 1935, omitted in printing.

[fol. 72] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed Nov. 26, 1935

It is hereby stipulated between Fisher's Blend Station, Inc., a corporation, appellant above named, and The Tax

Commission of the State of Washington and Thomas S. Hedges and T. M. Jenner, members of said Commission, the appellees above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in and shall constitute said record on appeal:

1. Complaint.
2. Injunction pendente lite.
3. Demurrer.
4. Stipulation as to Additional Facts.

[fol. 73] 5. Order Overruling Demurrer and Judgment and Decree Granting Permanent Injunction.

6. Notice of Appeal.
7. Opinion of the Supreme Court of the State of Washington.
8. Per Curiam Opinion of the Supreme Court of the State of Washington.
9. Order Denying Petition for Rehearing.
10. Judgment of the Supreme Court of the State of Washington.
11. Assignment of Errors.
12. Statement as to Jurisdiction.
13. Petition for Appeal.
14. Order Allowing Appeal and Fixing Cost Bond.
15. Cost Bond.
16. Citation.
17. Statement directing attention to United States Supreme Court, Rule 12.
18. Proof of service of papers required by United States Supreme Court, Rule 12.
19. Stipulation for Transcript on Appeal.
20. Clerk's Certificate.

R. J. Venables, Donald G. Graham, James B. Howe, Attorneys for Appellant. G. W. Hamilton, Attorney General, E. P. Donnelly, Assistant Attorney General, Attorneys for Appellees.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 11, 1935

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated this 26th day of November, 1935.

R. J. Venables, Donald G. Graham, James B. Howe, Attorneys for Appellant.

Service acknowledged this 26th day of November, 1935.

E. P. Donnelly, Asst. Atty. Genl., Attorneys for Appellees.

[fol. 76] [File endorsement omitted.]

Endorsed on cover: File No. 40,182. Washington Supreme Court. Term No. 628. Fisher's Blend Station, Inc., appellant, vs. The Tax Commission of the State of Washington et al. Filed December 11, 1935. Term No. 628, O. T., 1935.

FILE COPY

DEC 11 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC.,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

R. J. VENABLES,
DONALD G. GRAHAM,
JAMES B. HOWE,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Appeal timely taken	2
Finality of judgment	2
Judgment of the highest court	3
Validity of a State statute drawn into question and decision in favor of its validity	3
Statute	4
Application of the statute or nature of the case	7
Constitutional question timely and sufficiently raised	9
Cases believed to sustain the jurisdiction	11

Table of Cases Cited.

Board of Commissioners of Tippecanoe County v. Lucas, Treasurer, 93 U. S. 108	3
Bryant v. Zimmerman, 278 U. S. 63	12
Detroit International Bridge Co. v. Corporation Tax Appeal Board, 79 Sup. Ct. Rep. 337	11
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465	11
Edelman v. Boeing Air Transport, Inc., 289 U. S. 249	11
Federal Compress, etc. Co. v. McLean, 291 U. S. 17	11
Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington et al. (Advance Sheets, Washington Decisions, Vol. 82, No. 3, at page 123, and in Volume 84, No. 3, Washington Decisions of October 30, 1935, page 91)	1
Great Northern Ry. Co. v. State of Minnesota, 278 U. S. 503	11
Gulf Refining Co. v. United States, 269 U. S. 125	3
Hall v. Geiger-Jones Co., 242 U. S. 539	11
Henderson Bridge Co. v. Kentucky, 166 U. S. 150	11
King Mfg. Co. v. City Council of Augusta, 277 U. S. 100	12
Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41	11
Mower v. Fletcher, 114 U. S. 127	3
North Carolina Ry. Co. v. Zachary, 232 U. S. 248	11
Ozark Pipe Line Corporation v. Monier, 266 U. S. 555	11
Paramount Pictures Distributing Co. v. Henneford (decided by Supreme Court of Washington, November 12, 1935, Vol. 84, Washington Decisions 308)	7
Puget Sound Power and Light Co. v. City of Seattle, 291 U. S. 300	12
Puget Sound Power and Light Co. v. King County, 264 U. S. 22	2
Sprout v. City of South Bend, 277 U. S. 163	11

Page

Sultan Ry. Co. v. Dept. of Labor, 277 U. S. 135 12
U. S. Fidelity & Guaranty Co. v. Kentucky, 231 U. S. 394 11
Utah Power & Light Co. v. Pfost, 286 U. S. 165 11
Weston v. City Council of Charleston, 27 U. S. 449, 2 Pet. 449 12

STATUTES CITED.

Constitution of the State of Washington, Article IV, Sections 1, 4 and 6, found in Remington's Compiled Statutes of the State of Washington, 1922, Volume I, pages 75, 77 and 79, respectively 3
Constitution of the United States, Article I, Section 8 ..... 4, 7
Judicial Code, Section 237 (a), as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (Title 28 U. S. C., Sections 344 (a), 861 (a) and 861 (b)) 2
Occupation Tax Act of the State of Washington, embodied in Chapter 191, Laws of 1933, State of Washington, being Sections 8326-1 to 8326-30, Section 1, Subdivision 4 5
Subdivision 6 5
Subdivision 7 5
Section 2, Subdivision 2 4
Section 3 4
Section 6 6
Section 10 6
Section 13 6
Section 15 6
Section 17 6
Section 23 6
Remington's Compiled Statutes of Washington, 1922, Vol. 1, Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 926, and Section 1741, page 926 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC., A CORPORATION,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON AND THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF SAID COMMISSION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, appellant submits this statement showing that the appeal in the above entitled cause is properly before this Court.

Opinions Below.

The opinion of the Supreme Court of the State of Washington, reported at this time in Advance Sheets, Washington Decisions, Vol. 82, No. 3 published at Olympia, Wash-

ington, on June 5, 1935, at page 123, and in Vol. 84, No. 3, of said Washington Decisions published October 30, 1935, at page 91. Said opinions were filed on May 27, 1935, and October 17, 1935, respectively (R. 30-46). Petition for Rehearing was filed by appellant on July 13, 1935, and was denied on September 13, 1935 (R. 47). Judgment was entered on October 19, 1935 (R. 48).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the U. S. Judicial Code, as amended by the acts of February 13, 1925, January 31, 1928, and April 26, 1928; Title 28 U. S. C., Sections 344 (a), 861 (a) and 861 (b).

(1)

APPEAL TIMELY TAKEN.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered on October 19, 1935 (R. 48). The time for taking the appeal began to run on the date of such judgment. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.) A Petition for Appeal accompanied by Assignments of Error and Statement as to Jurisdiction required by Rule 12 (1) of the Supreme Court of the United States, was on the 26th day of November, 1935, presented to the Honorable William J. Millard, Chief Justice of the Supreme Court of the State of Washington, and by him allowed on the 26th day of November, 1935 (R. 49).

(2)

FINALITY OF JUDGMENT.

The judgment forming the basis of the appeal is a final judgment in the sense that it determines the controversy,

leaving nothing to be done except the ministerial act of enforcement. It is one denying plaintiff any relief and dismissing the action. The Trial Court had entered a final judgment upon the merits (R. 26). The judgment appealed from is final within the meaning of Section 237, Judicial Code.

Mower v. *Fletcher*, 114 U. S. 127;
Board of Commissioners of Tippecanoe County v. *Lucas, Treasurer*, 93 U. S. 108;
Gulf Refining Co. v. *United States*, 269 U. S. 125.

(3)

JUDGMENT OF THE HIGHEST COURT.

The judgment of the Supreme Court of the State of Washington is that of the highest Court in which, under the laws of the State, such judgment could be had. No further appeal may be had to it or any other court, save the Supreme Court of the United States, hence the appeal herein is taken from "a highest court of a State in which a decision in the suit could be had."

Constitution of the State of Washington, Article IV., Sections 1, 4 and 6, found in Remington's Compiled Statutes of the State of Washington, 1922, Volume 1, pages 75, 77 and 79 respectively.
Remington's Compiled Statutes of Washington, 1922, Vol. 1, Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 926; and Section 1741, page 926.

(4)

VALIDITY OF A STATE STATUTE DRAWN INTO QUESTION AND DECISION IN FAVOR OF ITS VALIDITY

In this suit appellant contended in the Court below that a State statute, as applied to appellant, was repugnant to

and in conflict with Section 8, Article I of the Constitution of the United States, which states that Congress shall have power "* * * to regulate Commerce with foreign nations and among the several States and with the Indian tribes * * *," and the decision of said Supreme Court of the State of Washington was in favor of the validity of the statute.

(*a*) *Statute.*

The statute, the validity of which was drawn into question, is the Occupation Tax Act of the State of Washington embodied in Chapter 191, Laws of 1933, State of Washington, being Sections 8326-1 to 8326-30 inclusive, of Remington's Compiled Statutes of Washington.

Said Act states in Section 2, Subdivision 2 thereof:

> "From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:
>
> * * * * * * *
>
> "(ed) Upon every person engaging in or continuing within this State in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent."

Section 3:

> "If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from

the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

The terms "person," "gross income" and "business" are defined in Section 1, Subdivision 4, 6 and 7 respectively thereof as follows:

"(4) The word 'person' or the word 'company,' herein used interchangeably, shall mean and include any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

"(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; Provided, the term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

"(7) The word 'business' shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in taxable in the class in which it falls."

Section 6 of said Act requires persons engaged in the business of radio broadcasting to make monthly reports and monthly payments of the tax, said reports to set forth the gross income of such persons; penalties are imposed for failure to make such reports or payments as follows:

1. 10% of the assessed tax to be added as a penalty (Sec. 10).

2. 1% per month of the amount of the tax to be added until paid (Sec. 10).

3. Appellee may order the Sheriff of any county to levy upon all real and personal property of such persons for the payment of the tax (Sec. 15).

4. Appellees may instruct the Attorney General of the State of Washington to restrain Appellant from engaging or continuing in the business of radio broadcasting until the tax assessed is paid (Sec. 17).

5. It is unlawful for Appellant to fail or refuse to make said returns and in the event such returns are not made Appellant will be guilty of a gross misdemeanor and punishable in the manner provided by the laws of the State of Washington, to-wit: by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars or both (Sec. 23 and Remington's Compiled Statutes, Sec. 2267).

6. Appellees have the power to summon any person to testify as to any information which they might require with reference to the imposition of the tax, and, upon refusal to obey such summons, such person may be punished for contempt of court (Sec. 23).

Section 13 of said Act states that an injunction or restraining order may issue to restrain and enjoin the collec-

tion of any tax or penalty imposed thereunder or any part thereof, upon the ground that the assessment thereof is in violation of the Constitution of the United States or of the State of Washington.

The tax levied under the Act is an excise tax, not a property tax. Its purpose is to raise revenue. It was not imposed by the legislature in the exercise of its police power.

Paramount Pictures Distributing Co. v. *Henneford* decided by the Supreme Court of the State of Washington November 12, 1935, Vol. 84 Washington Decisions 308.

(b) Application of the Statute or Nature of the Case.

This is a suit by Appellant, as Plaintiff, against the Tax Commission of the State of Washington, which by law is vested with the administration of the Occupation Tax Act and with the assessment and collection of the taxes and penalties imposed thereunder, to enjoin the collection of any taxes under the Act from the Plaintiff. The grounds for the action are stated in part in paragraph XI of Plaintiff's Complaint, as follows:

> "That plaintiff while engaging or continuing in the business of radio broadcasting, as hereinabove described, is engaged solely in foreign and interstate commerce and that the operation of the Occupational Tax Act, insofar as this plaintiff is concerned, constitutes a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce which amounts to a regulation and direct burden thereon and, therefore, is repugnant to, in conflict with and contravenes Section 8, Article I of the Constitution of the United States, which states that Congress shall have power '• • • to regulate commerce with foreign nations and among the several states and with the Indian tribes • • •,'"

Appellees' demurrer to the complaint, as amended, was overruled and upon stipulation of the parties the cause was submitted to the court for final determination, upon the allegations of the complaint as an agreed statement of facts (R. 26). The Trial Court entered its decree permanently enjoining appellees from enforcing the Act against appellant (R. 26).

It is alleged in the complaint that appellant owns radio station KOMO and leases, as lessee, radio station KJR, both located in Seattle, Washington; that appellant is engaged in the business of radio broadcasting by virtue of its operation of said stations pursuant to licenses issued to it by the Federal Radio Commission, copies of which licenses are annexed to the complaint, marked Exhibits A and B, and which licenses provide that said stations shall not be operated by others without the written consent of the Federal Radio Commission (R. 3, 16, 18); that appellant's business of radio broadcasting consists of transmitting radio programs from said stations through space to numerous radio receiving sets, by converting said programs by electricity into electro-magnetic waves which move through the ether and are detected by such receiving sets and amplified into audible sound; that it is impossible to confine such waves within state lines, and that all radio communications, anywhere in the United States, travel actually or potentially across state lines (R. 4); that appellant's station KJR is a so-called clear channel station and, as such, designed, licensed and assigned sufficient power for the effective transmission of radio broadcasting over the entire area of the United States and that radio station KOMO is a so-called regional station and, as such, designed, licensed and assigned sufficient power for the effective transmission of radio broadcasting over the entire area of the so-called Fifth Zone which embraces the states

and territories of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Hawaii and Alaska (R. 5); that in truth and in fact said stations have been and now are engaged in broadcasting in said manner and that said broadcasting has covered said designated areas and also certain parts of the high seas adjacent thereto and certain parts of the Dominion of Canada, particularly the Province of British Columbia (R. 6); that such stations are links in a system of national and Pacific Coast broadcasting in that they relay the national and Pacific Coast broadcasts of the National Broadcasting Company, Inc., a corporation engaged in the business of broadcasting radio programs over the entire United States (R. 6); that the gross income of appellant from its radio broadcasting business consists of payments made to it by the National Broadcasting Company, Inc., for the broadcasting of national and Pacific Coast programs as aforesaid, and payments made to appellant by commercial advertisers, who desire to reach the listening public in the areas above mentioned, for broadcasting programs originating at appellant's stations or at stations situated in other states and connected by wire with appellant's stations (R. 7); that a large number of persons, many of whom reside outside of the State of Washington, but a substantial portion of whom reside within the State of Washington, listen to the program broadcast by appellant from its stations (R. —). *All of these allegations of the complaint are admitted.*

(c) Constitutional Question Timely and Sufficiently Raised.

The constitutionality of the Statute was drawn into question by appropriate allegations in paragraph XI of the complaint, quoted above. The question was expressly de-

cided by the State Supreme Court as shown by the following quotations from the Opinion of the Supreme Court:

> "Respondent contends that it is engaged solely in interstate commerce, and that a tax upon the gross receipts derived from radio broadcasting amounts to a tax upon interstate commerce and cannot be collected, the same being in contravention of the commerce clause of the Constitution of the United States."
>
> * * * * * * *
>
> "Respondent does not question any tax levied by the State of Washington upon its tangible property, but contends that, by seeking to collect a tax based upon the gross revenue which it receives from its broadcasting station, the State is laying a burden upon interstate commerce and seeking to exact a payment which it has no right to demand."
>
> * * * * * * *
>
> "* * * respondent relying solely upon the proposition that the tax to which it objects is a burden upon interstate commerce.
>
> * * * * * * *
>
> "If it be that the tax does affect interstate commerce, it does so merely incidentally, and does not constitute a burden thereon to such an extent as to require a holding that the tax is void as to respondent as obnoxious to the commerce clause of the Federal constitution."
>
> "Millard, C. J. (dissenting): I am convinced that radio broadcasting is interstate commerce. Therefore the State may not levy an occupation tax against respondent. The judgment should be affirmed."

Furthermore, the State Supreme Court in its opinion cites the following cases in determining whether this tax

constitutes a burden on interstate commerce, in violation of the commerce clause:

Federal Compress, etc. Co. v. *McLean,* 291 U. S. 17;
Edelman v. *Boeing Air Transport Inc.,* 289 U. S. 249;
Hall v. *Geiger-Jones Co.,* 242 U. S. 539;
U. S. Fidelity & Guaranty Co. v. *Kentucky,* 231 U. S. 394;
Utah Power & Light Co. v. *Pfost,* 286 U. S. 165;
East Ohio Gas Co. v. *Tax Commission,* 283 U. S. 465;
Ozark Pipe Line Corporation v. *Monier,* 266 U. S. 555;
Henderson Bridge Co. v. *Kentucky,* 166 U. S. 150;
Detroit International Bridge Co. v. *Corporation Tax Appeal Board,* 79 Sup. Ct. Adv. Opinions 337;
Sprout v. *City of South Bend,* 277 U. S. 163.

All of these cases have to do with the constitutionality of State statutes in respect to the Constitution of the United States.

The opinion and judgment which the Supreme Court rendered and entered could not have been rendered or entered without denying to appellant all of the rights asserted by it under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Section 237 of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this Court.

North Carolina Ry. Co. v. *Zachary,* 232 U. S. 248;
Mallinckrodt Chemical Works v. *Missouri,* 238 U. S. 41;
Great Northern Ry. Co. v. *State of Minnesota,* 278 U. S. 503;

King Mfg. Co. v. *City Council of Augusta,* 277 U. S. 100;
Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135;
Bryant v. *Zimmerman,* 278 U. S. 63, 67;
Puget Sound Power & Light Co. v. *City of Seattle,* 291 U. S. 300;
Weston v. *City Council of Charleston,* 27 U. S. 449, 2 Pet. 449.

Dated the 26th day of November, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION INC., a corporation,
Appellant,

VS.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, members of said Commission,
Appellees.

APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ARGUS PRESS, SEATTLE

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SUBJECT INDEX

	Page
Statement	1
The Decision of the Court Below	2
The Statute	5
Appellant	7
Appellees	7
The Proceedings in the State Court	7
Facts	8
1. The Nature of Radio Broadcasting	8
2. Control of Radio Broadcasting by Federal Radio Commission	9
3. Description of Clear Channel and Regional Channel Stations	9
4. The Business of Appellant	10
5. Appellant's Revenues	11
Specifications of Errors Relied Upon	13
Summary of Argument	15
Argument	17
Point I. The Facts Presented in this Record, Agreed to by the Parties, Clearly Demonstrate that Appellant is Engaged in Interstate and Foreign Commerce	17
Point II. Appellant's Gross Income is Derived from Interstate Commerce	23
Point III. The Conclusions of the State Court that Appellant is not Engaged in Radio Broadcasting but Leases its Stations to Advertisers who Broadcast, Finds Absolutely No Support in the Record	25
Point IV. The Conduct of Local Activities as Incidental to Appellant's Business of Radio Broadcasting will not Sustain the Court's Holding that Appellant is Engaged in Intrastate Commerce	30

Page

Point V.
This Court will Review and Reverse the Finding of the State Court Because Such Finding is Without Evidence in the Record to Support it and Because as a Result of Such Finding a Federal Right of Appellant has been Denied.... 33

Point VI.
Chapter 191, Laws of 1933, of the State of Washington, as Applied by the Court Below to Appellant is Unconstitutional Because it is Imposed on Gross Receipts from Interstate Commerce 35

Point VII.
Chapter 191, Laws 1933, of the State of Washington, as Applied by the Court Below to Appellant is Repugnant to Section 8, Article I of the Constitution for the Further Reason that it Attempts to Condition Appellant's Right to Engage in its Interstate Commerce Business of Radio Broadcasting Upon the Payment of the Occupation Tax..... 39

Point VIII.
The Cases Cited by the Court Below to Support its Main Theory are Applicable only on the Assumption that Appellant Leases its Stations. There Being no Support in the Record for this Assumption, these Cases are not at all in Point..... 42

Appendix "A" .....following page 43

INDEX TO AUTHORITIES

Cases Cited

	Page
American Bond & Mfg. Co. et al. v. United States, 52 Fed. (2d) 318	18
Barrett v. New York, 232 U. S. 14	41
Bowman v. Continental Oil Co., 256 U. S. 642	41
Brown v. Maryland, 12 Wheat. 419	41
Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191	17
Caha v. United States, 152 U. S. 211	29
City of Atlanta v. Oglethorpe University, 178 Ga. 379, 173 S. E. 110	18
Coffey v. Midland Broadcasting Co. et al., 8 Fed. Supp. 889	27
Cooney v. Mountain State Telephone & Telegraph Co., 294 U. S. 384	41
Crew Levick Co. v. Pennsylvania, 245 U. S. 292	38
Crutcher v. Kentucky, 141 U. S. 47	41
Detroit International Bridge Co. v. Corporation Tax Appeal Board, 294 U. S. 83	4, 42
Duncan v. United States, 48 Fed. (2d) 128	18
Durham Life Ins. Co. v. Federal Radio Commission, 55 Fed. (2d) 537	18
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465	36
Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co., 289 U. S. 266	17, 18
First National Bank v. Hartford, 273 U. S. 548	35
Fisher's Blend Station, Inc. v. Tax Commission, 82 Wash. Dec. 123, 45 Pac. (2d) 942	1, 2, 3, 4
Galveston H. & S. Ry. v. Texas, 210 U. S. 217	31, 37, 38
Hanover Ins. Co. v. Harding, 272 U. S. 494	35
Henderson Bridge Co. v. Kentucky, 166 U. S. 150	4, 42
Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573	35
KFKB Broadcasting Association Inc. v. Federal Radio Comm., 47 Fed. (2d) 670	18

Page

KVL Inc. v. Tax Commission of Washington, 12 Fed. Supp. 497 (adv. op.) 18, 39

Leloup v. Mobile, 127 U. S. 640 40

New Jersey Bell Telephone Co. v. State Board of Taxes & Assessments of the State of New Jersey, 280 U. S. 338 ..... 38, 41

Northern Pacific Ry. v. State of Washington, No. 529, U. S. Supreme Court 1935 39

Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136 38

Owl Drug Co., In re, 12 Fed. Supp. 439 (adv. op.) .. 30

Ozark Pipe Line Corporation v. Monier, 266 U. S. 555 ..... 32, 41

Paramount Pictures Distributing Co. v. Henneford, 74 Wash. Dec. 308, 51 Pac. (2d) 385 (adv. op.) 36

Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S. 326 ..... 36, 38

Pickard v. Pullman Southern Car Co., 117 U. S. 34.. 41

Remick & Co. v. General Electric Co., 16 Fed. (2d) 829 28

Robbins v. Shelby County Taxing District, 120 U. S. 489 41

Sprout v. City of South Bend, 277 U. S. 163 40

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 Pac. (2d) 91 35

Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. (2d) 111 18

Trinity Methodist Church, South v. Federal Radio Commission, 62 Fed. (2d) 850 18

Truax v. Corrigan, 257 U. S. 312 33

United States v. American Bond & Mtg. Co., 31 Fed. (2d) 448 18

United States Glue Co. v. Oak Creek, 247 U. S. 321.. 38

Van Dusen v. Dept. of Labor & Industries, 158 Wash. 414, 290 Pac. 803 18

WBT v. Poulnot, 46 Fed. (2d) 671 ..... 18, 19

Page

Western Union Tel. Co. v. Spreight, 254 U. S. 17.... 17
Whitehurst v. Grimes, et al., 21 Fed. (2d) 787..... 17
Pantomimic Corp. v. Malone, 238 Fed. 135 (C. C. A. 2d.) 20

Constitution Cited

Constitution of the United States, Article I, Sec. 8.....1, 8, 9, 13, 14, 16, 36, 39, 40

Statutes Cited

Communications Act of 1934:
47 U. S. C. A., Secs. 151 *et seq*.....20, 23, 29
47 U. S. C. A., Sec. 151..... 22
47 U. S. C. A., Sec. 152..... 22
47 U. S. C. A., Sec. 307..... 23
47 U. S. C. A., Sec. 315..... 23
47 U. S. C. A., Sec. 316..... 23
47 U. S. C. A., Sec. 326..... 23
47 U. S. C. A., Sec. 604..... 29

Laws of Washington, 1933: *Appendix* 1 to 10
Chap. 191, pp. 869 to 897....1, 5, 13, 15, 16, 35, 36, 39
Chap. 191, Sec. 2 (2) (ed) p. 875.....4, 5, 6
Chap. 191, Sec. 3, p. 879.....6, 39
Chap. 191, Sec. 5, pp. 879-880..... 6
Chap. 191, Sec. 17, p. 889.....6, 40
Chap. 191, Sec. 21, p. 890..... 7
Chap. 191, Sec. 23, p. 891..... 6

Note: Chap. 191 of Laws of Washington, 1933, is not included in Remington's Revised Statutes of Washington. See Vol. 9 Remington's Revised Statutes of Washington, Pocket Supplement, page 58.

Radio Act of 1927:
47 U. S. C. A., Sec. 81.....20, 28
47 U. S. C. A., Sec. 90..... 23

Page

47 U. S. C. A., Sec. 91 28
47 U. S. C. A., Sec. 92 29
47 U. S. C. A., Sec. 94 29
47 U. S. C. A., Sec. 98 23
47 U. S. C. A., Sec. 100 29
47 U. S. C. A., Sec. 109 23
Rules and Regulations of Federal Radio Commission, Sec. 20 29

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Appellees.
No. 628

APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

STATEMENT

This is an appeal from the judgment of the Supreme Court of the State of Washington (R. 39) rendered upon its decision (R. 24) [reported in 82 Wash. Dec. 123, 45 Pac. (2d) 942], holding that a statute of that state (Chapter 191 of the Laws of 1933) known as the Occupation Tax, which imposes upon Appellant a tax amounting to one per cent of Appellant's gross income from its business of radio broadcasting, was valid and, as applied to Appellant, is not repugnant to or in conflict with Section 8, Article I, of the Constitution of the United States—the Commerce Clause.

The Decision of the Court Below

The court below, conceding that the state had no power to and did not intend to tax interstate commerce or the gross receipts therefrom, ruled that Appellant was not engaged in interstate commerce but in intrastate commerce and was, therefore, subject to the tax.

The record consists of an agreed statement of facts, and the foregoing ruling of the court below, it is submitted, is without any support whatsoever in the record, as will be hereinafter shown.

The court below, at the outset of its opinion, ruled that radio broadcasting stations are engaged in interstate commerce. It said:

> *"It must be admitted that, in their activities, the waves which are intentionally released by broadcasting stations in the course of their business are, in their field of activities, essentially interstate and international."* (82 Wash. Dec. at p. 126, 45 Pac. (2d) at p. 943, R. 26).
>
> *"It must be conceded that, once the magnetic waves are released from a broadcasting station, they become an interstate and international activity, or energy, and in the present state of the art are, generally speaking, subject to no human control, save, of course, that they can be interfered with or blanketed by other and stronger waves released at strategic points."* (82 Wash. Dec. at p. 126, 45 Pac. (2d) at p. 944, R. 27).
>
> "It cannot be denied that radio broadcasting

[*Italics ours throughout the brief unless otherwise noted*]

is, in its sphere of activity, essentially interstate and international. It has been held in the cases above referred to, probably upon sound reason, *that the use by a person of his own station constitutes interstate commerce*, as does the setting up and operation of a receiving set." (82 Wash. Dec. at p. 136, 45 Pac. (2d) at p. 948, R. 35).

The Supreme Court of Washington, despite this finding, ruled that Appellant was not engaged in radio broadcasting but that it merely leased its stations to advertisers who did the broadcasting. It thus stated:

"The tax which appellants seek to collect is a direct burden upon the business of respondent only insofar as it derives an income from leasing its stations to others for compensation." (82 Wash. Dec. at p. 129, 45 Pac. (2d) at p. 945, R. 29).

"Insofar as the conduct of its business affairs by respondent is concerned, it is all purely intrastate. Its plants are entirely within the state of Washington; its contracts provide only for the use of its stations and the recognized facilities thereof, including their power to project electromagnetic waves. Respondent completes its contracts with its patrons when it turns over its stations to them or to their agents, and it is none of respondent's concern, as long as the stations function properly, where or by whom the waves or vibrations which it causes to be released are received and transmuted into sound." (82 Wash. Dec. at p. 137, 45 Pac. (2d) at p. 949, R. 36).

Upon this finding of fact, that Appellant was not engaged in broadcasting but in leasing its stations to others who broadcast, the Supreme Court of Washington premised its ruling that no federal right of Appellant had been denied. The court relied on such cases as *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 294 U. S. 83, citing them for the proposition that the owner of an interstate bridge, over which persons engaged in interstate commerce pass on the payment of a fee, is not itself engaged in interstate commerce. The Supreme Court of Washington concluded:

> "The surrounding ether may be likened to the bridge, and, while respondent does not lease the ether, it does *lease* a device which enables its patron to use the ether as a 'bridge' or medium of communication between the station and such receiving appliances as may be so attuned as to reproduce the message released through space." (82 Wash. Dec. at p. 134, 45 Pac. (2d) 947, R. 33).

Amazingly enough, however, the Supreme Court of Washington while ruling that Appellant was not engaged in broadcasting commercially, but in leasing its stations, at the same time had no difficulty in ruling that Appellant was subject to the tax imposed by Chapter 191, Laws 1933, Section 2 (2) (ed):

> "Upon every person engaging in or continuing within this state in the business of radio broadcasting; * * *."

In other words, the Supreme Court of Washington

made wholly inconsistent conclusions as to the nature of Appellant's business. On the one hand, it ruled that Appellant was not engaged in commercial radio broadcasting in determining whether Appellant was engaged in interstate commerce. Yet in the next breath, it reached the conclusion that Appellant was engaged in commercial radio broadcasting and, therefore, was subject to the tax imposed on those engaged in radio broadcasting.

The Statute

The pertinent sections are set forth in Appendix A, annexed hereto.

The preamble to Chapter 191, Laws of 1933 of the State of Washington states that it is an act "* * * imposing taxes upon the privilege of engaging in business activities."

Section 2 describes the business activities subject to the tax, which are segregated into five principal classifications: (1) extractive function, (2) manufacturing and producing function, (3) wholesaling and retailing, (4) retail distribution, (5) performing and rendering services.

Subdivision (2) levies

> "an annual tax or excise for the privilege of engaging in business activities * * * measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be * * *."

Section 2 (2) imposes a tax of varying percentages on gross income for the several kinds of business ac-

tivities comprising the five classifications; and subdivision (e) (ed) of Section 2 (2) provides that:

> "Upon every person engaging in or continuing within this state in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent."

Section 3 provides that:

> "If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, *upon the condition that he shall pay* the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Section 17 states that any person may be enjoined from engaging or continuing in any business until the tax is paid.

Section 23 makes it unlawful to fail or refuse to obtain a license or to fail or refuse to make a return or to make any false return and any person violating any of the provisions of this section is guilty of a gross misdemeanor punishable by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars or both.

Section 5 states that in computing the amount of

the tax, there shall be exempt from gross proceeds of sales or gross income so much thereof as is derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the Constitution or laws of the United States.

Section 21 directs that the monies collected under the Act shall be paid into the state school fund up to a certain amount and over that amount shall be deposited to the credit of the state's general fund.

Appellant

Appellant operates two radio stations, KOMO and KJR, located in Seattle, Washington. It owns KOMO and leases KJR. It operates said stations in the business of radio broadcasting pursuant to licenses issued to it by the Federal Radio Commission. (Copies of said licenses are to be found in the Transcript of Record herein at p. 14.)

Appellees

Appellees are members of the Tax Commission of the State of Washington which is vested with the administration of Chapter 191 of the Laws of 1933 of the State of Washington, and is empowered to supervise the making of returns provided for therein, and the assessment and collection of taxes and penalties imposed thereunder.

The Proceedings in the State Court

Appellant, as plaintiff, instituted injunction proceedings in August, 1933, against the Tax Commission of the State of Washington and against the two members of the Commission. The bill of complaint, as amended by a stipulation as to additional facts,

sets forth that Appellant, in the business of radio broadcasting, was engaged in interstate commerce and that the occupation tax, conditioning Appellant's exercise of the privilege of engaging in such commerce, and measured by its proceeds from such commerce, was repugnant to and in conflict with Section 8, Article I of the Constitution of the United States (R. 1 to 18).

Appellees' demurrer (R. 19) to the complaint, amended as aforesaid, was overruled (R. 22).

Thereafter, upon a stipulation of the parties, the cause was submitted to the trial court for final determination upon the allegations of the complaint, as amended, as an agreed statement of facts (R. 23). The trial court entered a decree permanently enjoining Appellees from enforcing the act against Appellant (R. 22).

The Supreme Court of the State of Washington reversed the trial court, sustained the validity of the Act, and entered its judgment on October 19, 1935, denying Appellant any relief and ordering dismissal of the action. One judge, the Chief Justice, dissented.

Facts

This case arises on an agreed statement of facts.

The Record herein thus establishes the following facts:

1. *The nature of radio broadcasting*: Radio broadcasting consists of the transmission of electro-magnetic waves through the connecting medium known as the ether to receiving instruments which detect the incoming radio waves and amplify them into

sound. These electro-magnetic waves are transmitted through the ether by stations which set them in motion by electricity. The waves move at the speed of light and, in the present state of the art of radio broadcasting, they cannot be confined within state lines (R. 4).

2. *Control of radio broadcasting by the Federal Radio Commission*: Congress, under the authority conferred upon it by Section 8, Article I of the Constitution of the United States, has assumed control of all communications by radio, acting through the Federal Radio Commission. The Federal Radio Commission has, for the purpose of radio broadcasts, divided the United States into five zones, the fifth of which embraces Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Territory of Hawaii and Alaska. The Federal Radio Commission has assigned certain quotas limiting the radio frequency bands of stations and their power in each of the five zones (R. 4). The radio frequencies assigned to stations represent bands of wave length to be used only by certain designated stations in each zone. These radio frequency bands are of four types: Clear Channel, High Powered Regional, Regional and Local Frequencies (R. 5).

3. *Description of Clear Channel and Regional Channel Stations*: A clear channel station is one which has assigned to it a frequency band which no other station is to use at the same time and is designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States.

A clear channel station is assigned sufficient power by the Federal Radio Commission to accomplish that end (R. 5).

A regional station is one which has assigned to it by the Federal Radio Commission a radio frequency band for the effective transmission of radio broadcasting over the entire area or zone in which it is located and it is assigned sufficient power so to do (R. 5).

4. *The business of Appellant*: Appellant, through its operation of Station KOMO, which it owns (R. 3), and Station KJR, which it leases (R. 3), is engaged in the business of radio broadcasting (R. 3). That is, it is engaged in the business of transmitting electro-magnetic waves, which cross state lines, through the ether to receiving sets. Appellant operates each of these stations pursuant to a license obtained from the Federal Radio Commission (R. 3). The Federal Radio Commission has assigned Station KJR as a clear channel station, and Station KOMO as a regional station (R. 5). As a consequence, Appellant through said stations broadcasts continually and effectively over the areas designated to be covered as above indicated, by clear channel and regional stations, and also over certain parts of the high seas adjacent thereto and certain parts of the Dominion of Canada, particularly the Province of British Columbia (R. 5, 6).

These broadcasts are thus heard by a large number of persons (the exact number being unknown to either Appellant or Appellees), many of whom reside outside the State of Washington, but a substantial

portion of whom are resident within the State of Washington (R. 21).

5. *Appellant's revenues*: Appellant's gross income is derived from payments made for the broadcasting of programs (the transmission of electro-magnetic waves) by those who desire to reach the listening public in the areas and territories above described, beyond the State of Washington (R. 7). This gross income comes in part from the National Broadcasting Company which transmits programs by wire from outside the State of Washington to Appellant's stations for broadcast, and from commercial advertisers who desire to have programs and advertising broadcast (R. 7, 21).

The complaint, as amended, the facts of which are admitted to be true, states with respect to Appellant's business and revenues:

> Appellant "*is engaged in the business of radio broadcasting.*" (R. 3).
>
> Stations KOMO and KJR " have been and now *are engaged in broadcasting commercially* in said manner * * *." (R. 5).
>
> "That Stations KOMO and KJR are links in a system of National and Pacific Coast broadcasting in that they *relay* the National and Pacific Coast broadcasts of the National Broadcasting Company * * *." (R. 6).
>
> Appellant's "gross income arises out of payments made by the National Broadcasting Company Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commer-

cial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, *who desire to reach the listening public in the areas and territories hereinabove described.*" (R. 7).

"That the plaintiff, in engaging in the business of radio broadcasting as herein described, sells time to its customers at a charge of so much per minute of the time consumed. Plaintiff is required by the regulations of the Federal Radio Commission to occupy all time allotted to it in broadcasting and *when not broadcasting for one of its customers*, as above described, is required to furnish broadcasting programs and does so in the following way:

"(a) By broadcasting a program emanating from its own studios.

"(b) By purchasing a program broadcast by one of the chain systems and brought to plaintiff's studios by wire. Such program is generally known as a sustaining program." (R. 20).

"That the revenues of the plaintiff arising from the business of radio broadcasting come from the following sources:

"(a) From the National Broadcasting Company or other chain broadcasting companies for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, originating outside of the State of Washington

and transmitted to plaintiff's broadcasting station by wire.

"(b) From persons, firms or corporations for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising and announcements originating in plaintiff's studios or transmitted to plaintiff's studios, such programs and announcements being broadcast only by plaintiff's stations.

"(c) From persons, firms or corporations for use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, which are simultaneously broadcast from plaintiff's stations and transmitted by wire to other radio stations located within the State of Washington, for broadcast from such stations.

"(d) Same as (c) except the word 'within' changed to 'without'." (R. 21).

SPECIFICATIONS OF ERRORS RELIED UPON

1. The Supreme Court of the State of Washington by its judgment erred in reversing the decree of the Superior Court for Thurston County which granted a permanent injunction to Appellant, and against Appellees, and adjudicated that the Occupation Tax Act (Chap. 191, Laws of 1933), the enforcement of which, against Appellant, was enjoined, contravenes and is repugnant to Section 8, Article I, (the Commerce Clause) of the Constitution of the United States in that as applied to Appellant it is a tax or excise upon the privilege of engaging or continuing to engage in

interstate and foreign commerce and amounts to a direct burden thereon.

2. The Supreme Court of the State of Washington erred in entering judgment in favor of Appellees denying Appellant any relief and dismissing the action and in failing to enter judgment that Appellant is entitled to the relief sued for, in that the enforcement against Appellant of the statute of the State of Washington sought to be enjoined, to wit, the Occupation Tax, contravenes and is repugnant to Section 8, Article I, the Commerce Clause, of the Constitution of the United States, in that said statute, so enforced, is a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce and amounts to a direct burden thereon.

3. The Supreme Court of the State of Washington erred in holding that Appellant, in the conduct of its business of radio broadcasting, is engaged in intrastate and not interstate commerce for the reason that the record shows Appellant is engaged solely in interstate commerce, and such holding that Appellant is engaged in intrastate commerce has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by stipulation of the parties.

4. The Supreme Court of the State of Washington erred in holding that Appellant leases or rents its facilities and "turns over" its stations for compensation to its patrons or their agents, for the reason that such holding has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by written stipulation of the parties.

5. The Supreme Court of the State of Washington erred in holding that the Act in question as applied to Appellant does not affect interstate commerce except incidentally and that it does not constitute a burden thereon and in failing to hold that the enforcement of the Occupation Tax Act against Appellant constitutes a direct burden on interstate commerce, as defined by and in accordance with the decisions of the Supreme Court of the United States. (R. 39-41).

SUMMARY OF ARGUMENT

1. The facts presented in this record, agreed to by the parties, clearly demonstrate that Appellant is engaged in interstate and foreign commerce.

2. Appellant's gross income is derived from interstate commerce.

3. The conclusion of the state court that Appellant is not engaged in radio broadcasting, but leases its stations to advertisers who broadcast, finds absolutely no support in the record.

4. The conduct of local activities as incidental to Appellant's business of radio broadcasting will not sustain the court's holding that Appellant is engaged in intrastate commerce.

5. This Court will review and reverse the finding of the state court because such finding is without evidence in the record to support it, and because as a result of such finding a federal right of Appellant has been denied.

6. Chapter 191, Laws of 1933, of the State of Washington, as applied by the court below to Appel-

lant, is unconstitutional because it is imposed on gross receipts from interstate commerce.

7. Chapter 191, Laws of 1933, of the State of Washington, as applied by the court below to Appellant is repugnant to Section 8, Article I of the Constitution for the further reason that it attempts to condition Appellant's right to engage in its interstate commerce business of radio broadcasing, upon the payment of the occupation tax.

8. The cases cited by the court below to support its main theory are applicable only on the assumption that Appellant leases its stations. There being no support in the record for this assumption, these cases are not in point.

ARGUMENT

POINT I

The Facts Presented in This Record, Agreed to By the Parties, Clearly Demonstrate That Appellant Is Engaged in Interstate and Foreign Commerce.

Appellant, engaged in radio broadcasting, transmits electro-magnetic waves across state lines. Through KJR and KOMO, it transmits such waves continuously and effectively over a number of states, as well as the adjacent high seas and the Dominion of Canada (R. 5, 6). These waves, which cannot be confined within state lines, (R. 4) are detected and converted into sound by receiving sets both in and without the State of Washington, with the result that listeners both within and without the state receive the programs which Appellant transmits to them* (R. 21).

It is the fact of transmission across state and national boundaries which constitutes the test of interstate commerce. *Western Union Tel. Co. v. Spreight*, 254 U. S. 17. Thus, the transmission of waves across state lines and into foreign countries has time and time again been held to constitute interstate and foreign commerce by the cases dealing with radio broadcasting.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co., 289 U. S. 266, at p. 279;
Whitehurst v. Grimes, et al., 21 Fed. (2d) 787 (E. D. Ky.);

* The stipulated facts are quite in accord with the opinion of this court in *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, at p. 200.

WBT v. Poulnot, 46 Fed. (2d) 671 (E. D. So. Ca.);

United States v. American Bond & Mtg. Co., 31 Fed. (2d) 448 (N. D. Ill.);

American Bond & Mtg. Co. v. United States, 52 Fed. (2d) 318 (C. C. A. 7th), cert. denied 285 U. S. 538;

Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. (2d) 111 (Ct. of App. D. C.);

Durham Life Ins. Co. v. Federal Radio Comm., 55 Fed. (2d) 537 (Ct. of App., D. C.);

Trinity Methodist Church, South v. Federal Radio Commission, 62 Fed. (2d) 850 (Ct. of App. D. C.), cert. denied 288 U. S. 599;

Duncan v. United States, 48 Fed. (2d) 128 (C.C.A. 9th), cert. denied 283 U. S. 863;

KFKB Broadcasting Association, Inc., v. Federal Radio Commission, 47 Fed. (2d) 670, 672 (Ct. of App., D. C.);

KVL Inc. v. Tax Commission of Washington, 12 Fed. Supp. 497 (D. Wash. 1935);

Van Dusen v. Dept. of Labor & Industries, 158 Wash. 414, 290 Pac. 803;

Contra:

City of Atlanta v. Ogelthorpe University, 178 Ga. 379, 173 S. E. 110.

This Court in *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266, at p. 279, stated:

"No question is presented as to the power of the Congress, in its regulation of interstate com-

merce, to regulate radio communications. *No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.* In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The Commission has been set up as the licensing authority and invested with broad powers of distribution in order to secure a reasonable equality of opportunity in radio transmission and reception."

In *Station WBT, Inc. v. Poulnot*, 46 Fed. (2d) 671 (E. D. So. Ca.), in which a state tax on radio receiving sets was held unconstitutional, the Court said (p. 675):

"There can be no doubt that communications by radio constitute interstate commerce. It has been so held by numerous courts, and the decisions of the Supreme Court of the United States defining interstate commerce necessarily lead to that conclusion. (Citing cases)

"The plaintiff contends that all radio communication is necessarily interstate, and in the present state of the art, this appears to be correct. However, it is not inconceivable that radio communication may in the future be so perfected that it may be confined strictly intrastate; but we do not consider it necessary to make any ruling upon that point now. Certainly under the facts of the present case, the plaintiff, through its broadcasting plant, is engaged in interstate commerce."

Pantomimic Corp. v. *Malone*, 238 Fed. 135 (C. C. A. 2d.) also demonstrates by way of analogy that the transmission of electro-magnetic waves across state and national lines constitutes interstate and foreign commerce. In that case, the transmission of light rays from a machine in Canada to a machine in New York State was held to be foreign commerce which could be prohibited by Congress.

Again, it should be noted that the control exercised by the Federal Communications Commission over radio broadcasting under the Radio Act of 1927 (44 Stat. 1162, 47 U.S.C.A. section 81 *et seq.*) and the Communications Act of 1934 (47 Stat. 1064, 1089, 1091, 47 U.S.C.A. section 151 *et seq.*), which superseded the Radio Act of 1927, is predicated upon the premise that the transmission of electro-magnetic waves in radio broadcasting, necessarily across state lines, is interstate commerce. This is apparent from a reading of the provisions of those acts.

Sec. 1 of the Radio Act of 1927 (47 U.S.C.A. Sec. 81) thus provided:

> "REGULATION OF INTERSTATE AND FOREIGN RADIO COMMUNICATIONS; GRANT OF LICENSE. This act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corpora-

tions, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

The Communications Act of 1934 (47 U. S. C. A. Secs. 151 and 152) provides:

"Sec. 151. PURPOSES OF ACT; FEDERAL COMMUNICATIONS COMMISSION CREATED.

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. (June 19, 1934, c. 652, Sec. 1, 48 Stat. 1064.)"

"Sec. 152. APPLICATION OF CHAPTER.

"(a) The provisions of this chapter shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regu-

lating of all radio stations as hereinafter provided; * * *."

Furthermore, federal control over the internal management of broadcasting, provided for by the Radio Act of 1927 and the Communications Act of 1934, would be without warrant or authority except for the fact that upon transmission the electro-magnetic waves passing through the ether necessarily cross state lines, and, therefore, constitute interstate commerce. Both these acts provide that all stations must operate in the public interest, necessity and convenience (47 U. S. C. A. sections 90, 307), must furnish equal opportunities for broadcast to candidates for public office (47 U. S. C. A. sections 98, 315), prohibits all stations from broadcasting lottery information (47 U. S. C. A. section 316) and prohibits the transmission of obscene, indecent or profane matter by means of radio communications (47 U. S. C. A. sections 109, 326). These regulations can be justified only because radio broadcasting is interstate commerce.

In conclusion, it need only be noted that the state court below ruled that the transmission of electro-magnetic waves across state lines constitutes interstate commerce and this ruling is binding on Appellees herein who have not appealed therefrom.

POINT II

Appellant's Gross Income Is Derived From Interstate Commerce.

This, too, is demonstrated by the Record. The Record shows that the revenue received by Appellant

consists of payments made to it for the broadcast of programs to the areas reached by its stations. It is stipulated that Appellant's "gross income arises out of payments made by the National Broadcasting Company Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, who desire to reach the listening public in the areas and territories hereinabove described" (R. 7). In other words, Appellant is paid for transmitting electro-magnetic waves throughout the areas beyond the State of Washington reached by its stations, which waves may be detected and amplified and converted into sound by any receiving set which may be tuned in throughout those areas.

So also it is stipulated that the "plaintiff (Appellant)* in engaging in the business of radio broadcasting as herein described, sells time to its customers at a charge of so much per minute of the time consumed. Plaintiff is required by the regulations of the Federal Radio Commission to occupy all time allotted to it in broadcasting and *when not broadcasting for one of its customers, as above described,* is required to furnish (sustaining) broadcasting programs * * *" (R. 20). The foregoing, particularly the italicized

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* Words in parentheses are ours throughout unless otherwise noted.

portion, shows that Appellant, not the customer, does the broadcasting, *i. e.*, transmits the electro-magnetic waves, and is paid therefor by its customer, which seeks to have itself advertised in the areas covered by Appellant's stations, at the rate of so much per minute.

Quite plainly, therefore, Appellant's gross income is derived from interstate commerce.

POINT III

The Conclusion of the State Court That Appellant Is Not Engaged in Radio Broadcasting But Leases Its Stations to Advertisers Who Broadcast, Finds Absolutely No Support In the Record.

Nowhere in the Record is it stated that Appellant leases or rents its stations to any one. Nowhere in the Record is it stated that its income is derived from the leasing or renting of its stations. Nowhere in the Record does it appear that Appellant at any time turns over its stations and their operation to advertisers to do the broadcasting, or that it contracts so to do.

Per contra, all the facts stipulated to show the nature of Appellant's activities and from what it derives its income, completely negative such findings. As to the nature of Appellant's activities and the source of its income, the facts are hereinbefore quoted under "Facts" paragraph 5. In the face of the facts there quoted, what possible warrant can there be for finding that Appellant does not broadcast and receive

its income therefrom, but leases its stations to advertisers, who on that theory would be the broadcasters?

True, the stipulation as to additional facts (R. 20), previously quoted in this brief, refers to payments made by National Broadcasting Company and other commercial advertisers as payments made "for the use of plaintiff's (Appellant's) broadcasting facilities." The word "use" in this sense connotes and is synonymous with "utilizing," or deriving the benefit of the operation of, Appellant's broadcasting apparatus. It would require a perversion and distortion of the English language to infer therefrom that Appellant leases or rents its stations. Certainly such an inference is contradicted by the language of the very paragraph in which the words occur. That paragraph begins as follows:

> "The revenues of the plaintiff (Appellant) arising from the business of radio broadcasting * * *"

This clearly indicates that Appellant derives its income because it broadcasts programs and not from leasing its stations.

So, too, the paragraph immediately preceding the one in which the word "use" is contained likewise clearly demonstrates that it is Appellant and not the customer who broadcasts. That paragraph states that Appellant broadcasts sustaining programs, "*when not broadcasting for one of its customers*" (R. 20). Other language in that same paragraph similarly indicates that it is Appellant which broadcasts for its customers. It thus states that "the plaintiff (Appellant) *in engaging in the business of radio broadcast-*

ing as herein described, sells time to its customers at a charge of so much per minute of the time consumed."

In short, all the stipulated facts bearing on the nature of Appellant's activities and the source of its income bear out the fact that Appellant is engaged in commercial broadcasting.

One might as well say that a shipper who "uses" the facilities of a railroad, or a telephone subscriber who "uses" a telephone, thereby leases or rents the railroad or telephone lines. Of course, that is not so.

It has been recognized by the courts that it is the owner of the station, and not the customer, who controls the instruments and transmits the electro-magnetic waves out over the ether, even though at times some advertiser or other person may be the one who speaks into the microphone. In *Coffey v. Midland Broadcasting Co.*, 8 Fed. Supp. 889 (W. D. Missouri, 1934), in discussing the liability of the owner of a broadcasting station for defamatory words spoken by a customer and broadcast by a station over the air, the District Court said:

> "The conclusion seems inescapable that the owner of the station is liable. It is he who broadcasted the defamation. He took the utterance of the speaker which came to him in the form of pulsations in the air. Those waves of air he changed into electrical impulses. Them he threw out upon the ether knowing they would be caught up by thousands and changed again into sound waves and into a human voice. He intended to do these things. But for what he has done the

victim of the defamation never would have been hurt."

Similarly, in *Remick & Company v. General Electric Company*, 16 Fed. (2d) 829 (S. D. N. Y. 1926), a copyright infringement case, Judge Thatcher said:

> "It is not enough to say that the broadcaster merely opens the window, and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and those acts are quite as continuous and infinitely more complex than the playing of the selection by the members of the orchestra."

Finally, it should be noted that Appellant is forbidden by law to surrender control of its stations to others. The admitted facts are that Appellant operates both Stations KOMO and KJR by virtue of licenses issued to Appellant by the Federal Radio Commission. Appellant's license requires Appellant "to render such broadcasting service as will serve public interest, convenience or necessity, to the full extent of the privileges herein conferred" (R. 16, 18), and provides that the license shall not vest in licensee any right to operate the station, or any right in the use of the designated frequency, in any manner other than is authorized in the license (R. 16, 18). The license authorizes Appellant and no one else to broadcast by means of the apparatus described therein.

Under Section 1 of the Radio Act of 1927 (47 U. S. C. A., Sec. 81), Appellant is required to have a license for the operation of its stations. Section 11 (47 U. S. C. A. Sec. 91) requires the licensee to operate

the station in accordance with the terms of the license, and provides that neither the license nor the right granted thereunder shall be assigned in violation of the provisions of this Act. Section 12 (47 U. S. C. A. Sec. 92) states that the station license, the wave length authorized to be used by the licensee, and the rights granted by the license, shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of without the consent in writing of the licensing authority. Section 14 (47 U. S. C. A. Sec. 94) provides for the revocation of a station license for noncompliance with the Act, or for failure to observe any regulations of the licensing authority. Section 20 (47 U. S. C. A. Sec. 100) requires the actual operation of all transmitting apparatus in any radio station to be carried on only by a person holding an operator's license issued under the Act.

These provisions of the Radio Act of 1927 have been re-enacted by the Communications Act of 1934 (47 U. S. C. A. Sec. 151 *et seq.*), the administration of the latter named Act, however, now being in the Federal Communications Commission.

Section 20 of the Rules and Regulations of the Federal Radio Commission*, of which this Court will take judicial notice under the rule laid down in *Caha v. United States*, 152 U. S. 211, further provides that the transfer of a station license without the consent of the Commission shall be sufficient ground for the revoca-

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*The rules and regulations of the Federal Radio Commission remain substantially unchanged under the Federal Communications Commission. See Title 47 U. S. C. A., Sec. 604(a).

tion of the license or the denial of any application for its renewal.

The finding of the court below that Appellant's entire revenue results from its surrender of control of the operation of its broadcasting stations and that it has permitted their operation by others, would lead to the conclusion that Appellant has so conducted itself as to give cause for the forfeiture of its licenses. A lease confers exclusive possession and control to the lessee in exchange for the payment of rentals (see, *In Re Owl Drug Co.*, 12 F. Supp. 439, 442) and this would constitute a violation of the above cited provisions of the statute pursuant to which Appellant holds its licenses.

We submit that there is no warrant in this record for a finding that Appellant has acted in violation of law and afforded ground for the revocation of its licenses.

POINT IV

The Conduct of Local Activities As Incidental to Appellant's Business of Radio Broadcasting Will Not Sustain the Court's Holding That Appellant Is Engaged In Intrastate Commerce.

The state court referring to Appellant owning property within the State of Washington and entering into contracts with persons residing within the state, states that Appellant completes its contracts with its patrons by turning over its stations to them or their agents and that these activities, denominated Appellant's "business affairs", are all purely intrastate.

Insofar as owning property and making contracts by Appellant is concerned it might be said that such activities are local in nature. Such activities, however, are engaged in only as a preliminary and necessary incident to radio broadcasting. The tax in question is not upon property nor upon the privilege of making contracts. It is specifically denominated as a tax upon the privilege of engaging in the business of radio broadcasting.

Moreover the revenue received is not for owning property or entering into contracts. There is but one source of revenue, namely, the payments made for broadcasting. By analogy, if the court's reasoning is correct, a tax upon a railroad engaged exclusively in interstate commerce measured by its gross receipts from such commerce, would be valid because the railroad engages in the local activities of owning property in the state and making contracts for the carrying of freight or passengers. Manifestly, the railroad is only entitled to revenue for the act of transportation. Such a tax, as later pointed out, is invalid as pertaining to railroads. *Galveston H. & S. Ry. v. Texas*, 210 U. S. 217.

We submit that there is no valid legal distinction between radio broadcasting by Appellant and what the court denominates the "business activities" of Appellant. There is only one business—the broadcasting of radio programs for revenue over an interstate area. Until Appellant has actually broadcast for the customer, by the projection of electro-magnetic waves, Appellant is not entitled to receive the payments to be made for such broadcasting. Prior to that time any

activities of the Appellant, which the state court calls local, are simply preliminary and incidental to the ultimate service purchased, the actual broadcasting.

The distinction between local activities incidental to interstate commerce and the interstate commerce itself is illustrated in *Ozark Pipe Line Corporation v. Monier*, 266 U. S. 555, which involved the validity of an annual franchise tax measured by the amount of the corporation's capital, as applied to a foreign corporation operating a pipeline to carry crude oil in interstate commerce across the state. It appeared that the corporation maintained an office within the state where its accounts were kept and from which it purchased supplies, employed labor and entered into contracts. It also maintained pumping stations to accelerate the passage of oil, owned automobiles and other property used exclusively in the prosecution of its interstate business. The court held the tax invalid as a regulation of interstate commerce despite the contention that the pipeline company was engaged in local activities, in addition to being engaged in interstate commerce. The court pointed out that the corporation's local business was so connected with the interstate commerce as to render the tax a burden upon such commerce:

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of

its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done, and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial, and extends to whatever is necessary to the complete enjoyment of the right protected."

POINT V

This Court Will Review and Reverse the Finding of the State Court Because Such Finding Is Without Evidence In the Record to Support It and Because As a Result of Such Finding a Federal Right of Appellant Has Been Denied.

Where, as in the case at bar, a federal right has been denied as a result of a finding in the state court shown by the Record to be without evidence to support it, this Court will review and reverse the finding and decision of the state court. This Court has so ruled on numerous occasions. Directly in point is *Truax v. Corrigan*, 257 U. S. 312. This Court there stated at p. 324:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. *Mackay v. Dillon*, 4 How 431; *Dower v. Rich-*

ards, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418; *Mugler v. Kansas*, 123 U. S. 623, 661; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 593; *Jones National Bank v. Yates*, 240 U. S. 541, 552, 553. In view of

these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard."

To the same effect, see:

Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591;

Hanover Ins. Co. v. Harding, 272 U. S. 494, 511;

First National Bank v. Hartford, 273 U. S. 548, 552.

POINT VI

Chapter 191, Laws of 1933, of the State of Washington As Applied By the Court Below to Appellant Is Unconstitutional Because It Is Imposed on Gross Receipts From Interstate Commerce.

As appears from the provisions thereof quoted above, Chapter 191, Laws 1933, of the State of Washington, imposes an excise tax on Appellant's gross receipts for the privilege of engaging in the business of radio broadcasting.

The statute levies an excise tax for the privilege of engaging in business, not a property tax. *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 Pac. (2d) 91. It is not a police or regulatory measure nor is it

an excise in exchange for any special facility furnished by the state. *Paramount Pictures Distributing Co. v. Henneford*, 74 Wash. Dec. 308, 51 Pac. (2d) 385 (Nov. 1935).

Chapter 191, Laws 1933, thus imposes a tax on Appellant's receipts from interstate commerce because as seen, Appellant's gross receipts are derived from its interstate commerce business, *i. e.*, radio broadcasting. Such an occupation tax, of course, imposes an undue burden on interstate commerce and is, therefore, repugnant to Section 8, Article I, of the Constitution of the United States. This Court has so held on numerous occasions. In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, at p. 470, this Court said:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom."

Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S. 326, is conclusive. There a state tax was imposed upon the gross receipts of a steamship company engaged exclusively in interstate commerce. In holding the tax invalid, this court stated (122 U. S. at p. 335, 336):

> "The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company

from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. * * *

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you performed, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

This rule was reaffirmed and applied in *Galveston H. & S. Railway Co. v. Texas*, 210 U. S. 217, which declared unconstitutional a Texas statute imposing a tax on the gross receipts of railroads whose lines were wholly within the State of Texas. The lines connected, however, with other lines and a part of the taxpayer's gross revenue was derived from the carriage of passengers and freight coming from or

destined to points without the state. In holding that the tax on this portion of the business was unconstitutional, this Court said at p. 224:

> "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. * * *"

More recently the rule of constitutional law announced in the *Philadelphia & Southern Mail Steamship* case was applied in *New Jersey Bell Telephone Co. v. State Board of Taxes*, 280 U. S. 338, where it was said at p. 346:

> "But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;

Galveston H. & S. Railway Co. v. Texas, 210 U. S. 217;

Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136;

United States Glue Co. v. Oak Creek, 247 U. S. 321.

In *KVL Inc. v. Tax Commission of Washington*, 12 Fed. Supp. 497, a Washington tax statute identical with the one at bar, imposing an occupation tax on the gross receipts of a broadcasting station, was held by a statutory three-judge court to burden interstate commerce and an injunction against its enforcement was granted. The court expressly refused to follow the holding of the Washington Supreme Court in the instant case.

Under the authority of the cases above cited, the Occupation Tax of the State of Washington herein involved as applied to Appellant is clearly invalid.

POINT VII

Chapter 191, Laws 1933 of the State of Washington As Applied By the Court Below to Appellant Is Repugnant to Section 8, Article I of the Constitution for the Further Reason That It Attempts to Condition Appellant's Right to Engage In Its Interstate Commerce Business of Radio Broadcasting Upon the Payment of the Occupation Tax.

Chapter 191, Laws of 1933, as applied by the Supreme Court of the State of Washington, imposes upon Appellant the obligation either of paying the tax, or of withdrawing from its activities in radio broadcasting.* It provides (Sec. 3, ch. 191, Laws of 1933):

---

*See brief of the Attorney General of the State of Washington in *Northern Pacific Railway v. State of Washington*, in the Supreme Court of the United States, October Term, 1935, No. 529, at page 57, where this is declared to be the effect of the Act.

> "If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business * * * for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such function."

Section 17 of ch. 191, Laws of 1933, further provides for the institution of injunction proceedings to restrain the continuance of any taxable business until the tax is paid.

If applicable to the Appellant, as the court below held it was, this statute plainly conditions Appellant's right to continue with its interstate commerce business upon the payment of a tax on its gross receipts from that business. In so doing, the statute as applied to Appellant conflicts with Section 8, Article I of the Constitution of the United States because, to use the language of this court in *Sprout v. City of South Bend*, 277 U. S. 163, at p. 171:

> "The privilege of engaging in such (interstate) commerce is one which a State cannot deny. * * * A State is equally inhibited from conditioning its exercises on the payment of an occupation tax."

The decision of this court in *Leloup v. Mobile*, 127 U. S. 640, likewise demonstrates the invalidity of the

statute here involved as applied to appellant. This court there said at page 648:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

Other cases to the same effect as the foregoing are:

Brown v. Maryland, 12 Wheat. 419;

Pickard v. Pullman Southern Car Company, 117 U. S. 34;

Robbins v. Taxing District of Shelby County, 120 U. S. 489;

Crutcher v. Kentucky, 141 U. S. 47;

Barrett v. New York, 232 U. S. 14;

Bowman v. Continental Oil Co., 256 U. S. 642;

New Jersey Bell Telephone Co. v. State Board of Taxes & Assessments of the State of New Jersey, 280 U. S. 338;

Ozark Pipe Line Corporation v. Monier, 266 U. S. 555;

Cooney v. Mountain State Telephone & Telegraph Co., 294 U. S. 384 (1935).

POINT VIII

The Cases Cited By the Court Below to Support Its Main Theory Are Applicable Only on the Assumption That Appellant Leases Its Stations. There Being No Support In the Record for This Assumption, These Cases Are Not At All In Point.

The court below cited and relied principally upon *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 294 U. S. 83. These cases merely follow the well-established rule that a state excise tax on the right of either a domestic or foreign corporation to act in a corporate capacity within the state is valid.

The court below stated that these cases hold that the owner of an interstate bridge collecting tolls from persons using that bridge is not engaged in interstate commerce and argued that, if the owner of such a bridge who rents that facility to persons engaged in interstate commerce is not itself engaged in such commerce, the owner of a broadcasting station who rents to others the facilities of the station is not engaged in interstate commerce. The court below said:

> "The surrounding ether may be likened to the bridge and, while respondent does not lease the ether, it does lease a device which enables its patron to use the ether as a 'bridge' or medium of communication between the station and such receiving appliances as may be so attuned as to reproduce the message released through space." (R. 33).

This analogy fails. In the bridge cases, a distinction is made between the owner of the bridge, a piece of inert property, and the railroad company, shipper or traveler who actually engages in that movement across state boundaries which constitutes interstate commerce. No such distinction exists in the field of broadcasting. There is no bridge, either physical or substantial, which is merely maintained by the broadcasters and across which others cause messages to flow. The broadcasting station owner himself transmits the electro-magnetic wave. The broadcasting station owner himself imposes upon that wave the modulations which permit properly attuned receiving sets to reproduce the sounds created in the studio, or other place of performance. This active communication and dissemination of radio programs is the act of interstate commerce, and this act is carried on not by advertisers or sponsors, but by the broadcasting station owner himself under license and requirement so to do.

IT IS SUBMITTED THAT THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON IS ERRONEOUS AND SHOULD BE REVERSED.

Respectfully submitted,

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APPENDIX "A"

Chapter 191, Session Laws of 1933.
Occupation Tax.

AN ACT relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties; making appropriations; and declaring that this act shall take effect immediately.

* * * * * * * *

SECTION 1. For the purposes of this act unless otherwise required by the context:

* * * * * * * *

(4) The word "person" or the word "company," herein used interchangeably, shall mean and include any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

* * * * * * * *

(6) The term "gross income" means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without

any deduction on account of losses: *Provided*, The term "gross income" shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

(7) The word "business" shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in taxable in the class in which it falls.

* * * * * * * *

SEC. 2. (1) Business activities, for the purpose of this act, are hereby declared to consist of the five separate and distinct functions, to-wit:

(a) The extractive function;

(b) The manufacturing and/or producing function;

(c) The wholesaling and/or jobbing function;

(d) The function of retail distribution;

(e) The function of performing and rendering services.

The taxes hereinafter imposed shall apply to all business activities within the state and to each function thereof, whether carried on separately or in combinations of two or more functions.

(2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against

values, gross proceeds of sales, or gross income, as the case may be, as follows:

* * * * * * * *

SEC. 2(e)(ed). Upon every person engaging in or continuing within this state in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent.

* * * * * * * *

SEC. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

* * * * * * * *

SEC. 5. In computing the amount of any tax imposed under subdivisions * * * (2)(e) * * * of section 2 of this act, there shall be excepted from gross proceeds of sales or gross income so much thereof as is derived from sales of tangible personal property shipped or transported to points outside of the State of Washington, from sales to the United States government, or to the State of Washington, their departments or institutions, or from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution

or laws of the United States, and so much thereof as is collected by the taxpayer as an excise upon motor vehicle fuel or as a similar excise.

SEC. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. * * *

SEC. 7. On or before fifteen days after the end of the tax year, each person liable for the payment of a tax under the provisions of this act shall make a return setting forth the gross proceeds of sales and/or the gross income received and/or accrued during such tax year and such other information as the tax commission may require, compute the amount of tax chargeable against him for such tax year under the provisions of this act, deduct the amount of monthly or quarterly payments, as hereinbefore provided, and transmit the same to the tax commission together with a remittance, in the form required by section 20 of this act, covering the residue of the tax chargeable against him for such year. * * *

* * * * * * * *

SEC. 9. It shall be the duty of every person liable for any fee or tax imposed by this act to keep and

preserve, for a period of five years, suitable records of gross proceeds of sales and/or gross income and such other books or records of account as may be necessary to determine the amount of any tax for which he may be liable under the provisions of this act; and all such books, records and invoices shall be open for examination at any time by the commission or its duly authorized agent. Any person who shall fail to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceeding, the correctness of any assessment of taxes made by the tax commission and based upon any period for which such books, records and invoices have not been so kept and preserved.

SEC. 10. If any person shall fail or refuse to make any return required by this act, the tax commission shall proceed, in such manner as it may deem best, to obtain facts and information on which to base the assessment of the tax herein prescribed; and to this end the commission may by itself or its duly appointed agent make examination of the books, records and papers of any such person and may take evidence, on oath, of any person, relating to the subject of inquiry. The oath may be administered by any member of the commission or by any agent designated by it for that purpose.

As soon as the tax commission shall procure such facts and information as it is able to obtain upon which to base the assessment of any tax payable by any person who has failed or refused to make a return, the commission shall proceed to determine and assess the tax against such person but such action

shall not deprive such person from appealing to the superior court as hereinafter provided. To such tax the commission may add a penalty of ten per cent thereof for failure or refusal to make a return and likewise shall add a further penalty of one per cent per month of the amount of the tax for each thirty days or portion thereof from the date upon which the tax was due as provided by this act, and shall notify such taxpayer by mail of the total amount of such tax and added penalties and such total amount shall become due and shall be paid within ten days after the date of such notice.

* * * * * * * *

SEC. 13. All taxes imposed under the provisions of this act shall be paid in full before any action may be instituted in any court to contest all or any part of such tax. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty imposed by this act, or any part thereof, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

* * * * * * * *

SEC. 15. If any tax, increase or penalty imposed by this act or any portion of such tax, increase or penalty be not paid within fifteen days after the same shall become due, the tax commission shall issue a warrant under its official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof

as may be necessary, for the payment of the amount of such warrant, together with a further penalty of one per cent of the amount of the tax as determined by the tax commission for each thirty days or portion thereof after the date of such warrant, plus the cost of executing said warrant, and return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of such warrant.

The sheriff, within three days after the receipt of said warrant, shall file with the clerk of the superior court of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the tax or portion thereof and any increases and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the taxpayer against whom it is issued in the same manner as a judgment in a civil case duly docketed in the office of such clerk, and the sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of said superior court. The sheriff shall be entitled to the fees provided by law for his services in levying execution on a superior court judgment, which shall be added to the amount of such warrant. The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final

amount due is received, together with interest, penalties and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer. If the return on the warrant shall show that the same has not been satisfied in full, the amount of the deficiency shall remain in judgment against the taxpayer which may be collected in the same manner as the original amount of such warrant.

In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any agent of the commission authorized to collect income taxes or taxes under this act, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall not be entitled to any fee or compensation in excess of the actual expenses paid in the performance of such duty, which shall be added to the amount of such warrant.

SEC. 16. Any tax due and unpaid under this act and all increases and penalties thereon shall constitue a debt due the State of Washington and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies.

* * *

SEC. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, upon the order of the tax commission by proceedings instituted by the attorney general in the name of the State of Washington in the

superior court of the county in which the taxpayer resides or in which he has his principal place of business, from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this act.

* * * * * * * *

SEC. 19. Taxes imposed by this act shall be in addition to any and all other licenses, taxes and excises levied or imposed by the state or any municipal subdivision thereof.

* * * * * * * *

SEC. 21. The tax commission, on the next business day following the receipt of any payments under this act, shall transmit the same to the state treasurer, taking his receipt therefor. The state treasurer, upon receipt thereof, shall first deposit to the credit of the current state school suspense fund, which fund is hereby created, so much of any sums received as may be necessary to bring the total amount available in said fund to the sum of fifty thousand dollars ($50,000.00) and thereafter to maintain the said fund in said sum as a revolving fund for the payment of sums appropriated under sections 28, 29 and 29-A of this act and shall deposit the balance of all sums received to the credit of the current state school fund: *Provided*, That when the total sum deposited to the current state school fund, together with all other revenues credited to said fund, shall have reached the sum of twelve million five hundred thousand dollars ($12,500,000.00) in any year beginning on the first day

of April and ending on the 31st day of March of the succeeding year, then any surplus over and above said sum of twelve million five hundred thousand dollars ($12,500,000.00) received during such year shall be deposited to the credit of the state general fund.

* * * * * * * *

SEC. 23. It shall be unlawful for any person to fail or refuse to obtain the license, or to fail or refuse to make any return provided for in this act; or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or any part thereof imposed by this act; or for any person to [illegible] abet another in any attempt to evade the payment of such tax or any part thereof; or for the president, vice-president, secretary, treasurer or other officer of any company to make or permit to be made for any company any false return, or any false statement in any return required by this act, with intent to evade payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commission or its duly appointed agent, as required by this act; or to fail or refuse to permit the inspection or appraisal of any property by the commission or its duly appointed agent; or to refuse to offer testimony or produce any record as required in this act. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. (By Sec. 2267 Rem. Rev. St. this punishment is: imprisonment in the county jail for not more than one year or by a fine

of not more than $1000.00 or both). In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return, or any return containing any false or fraudulent statement with the intent aforesaid, shall be guilty of the offense of perjury in the second degree and, on conviction thereof, shall be punished in the manner provided by law; and any company for which a false return, or a return containing a false statement as aforesaid shall be made, shall be punished, upon conviction thereof, by a fine of not more than one thousand dollars ($1000.00). All penalties or punishments provided in this section shall be in addition to all other penalties provided in this act.

* * * * * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 628

FISHER'S BLEND STATION INC., a corporation,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, members of said Commission,
Appellees.

APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT.

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SUBJECT INDEX.

	PAGE
Appellee's Argument	1
Errors in Appellee's Argument	1
Functions of Appellant	2
Buck v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191	2
Chappell & Co. Ltd. v. *Associated Radio Co. of Australia Ltd.*, 50 Victoria Law Reports 350	3
2 George Washington Law Review 13	3
Summary of Appellant's Activities for Which it is Paid	4
The Analogy to the Functions of a Telephone Company	6
Discussion of Certain Authorities Referred to by Appellee	7
The Bridge Cases	7
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165	9
Hope Natural Gas Co. v. *Hall*, 274 U. S. 284	10
City of Atlanta v. *Oglethorpe University*, 178 Ga. 379	11
Blumenstock Bros. Adv. Agency v. *Curtis Pub. Co.*, 252 U. S. 436	12
Conclusion	13

INDEX TO AUTHORITIES.

Cases Cited.

	PAGE
Blumenstock Bros. Adv. Agency v. *Curtis Pub. Co.*, 252 U. S. 436	12
Buck v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191	2, 5
Chappell & Co. Ltd. v. *Associated Radio Co. of Australia Ltd.* (1925), 50 Victoria Law Reports 350	3
City of Atlanta v. *Oglethorpe University*, 178 Ga. 379, 173 S. E. 110	11, 12
Detroit International Bridge Co. v. *Corporation Tax Appeal Board*, 294 U. S. 83	7
Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150	7
Hope Natural Gas Co. v. *Hall*, 274 U. S. 284	10
Hope Natural Gas Co. v. *Hall*, 102 W. Va. 272	10
Indiana Farmer's Guide Pub. Co. v. *Prairie Farmer Pub. Co.*, 293 U. S. 268	12
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165	9, 11

Periodicals.

George Washington Law Review, Vol. 2	3
Harvard Law Review, Vol. XLIX (Jan. 1936)	8
University of Pennsylvania Law Review, Vol. 84	7

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REPLY BRIEF FOR APPELLANT.

I.

Appellee has rejected the argument advanced by the State Supreme Court below to support its judgment, to wit: that Appellant is engaged in the leasing of its facilities and thus is engaged in an intrastate activity. However, in place of the theory thus repudiated, Appellee has substituted a new one, which is equally unsound.

In effect, Appellee says that Appellant is paid for permitting the advertiser to use its facilities—the microphone—and thereby himself to superimpose upon carrier waves any program he desires; that it is for this use that Appellant is paid; and that Appellant itself does not broadcast—i. e. transmits no program across state lines.

The first difficulty with Appellee's theory is that if it is sound and all Appellant does is to make a contract

for the use of its facilities, then Ch. 191, of the laws of 1933 of the State of Washington does not purport to tax that activity. Ch. 191 purports to tax certain designated activities only, one of which is radio broadcasting, and does not tax the activity of making contracts for the use of broadcasting facilities.

The second difficulty with this contention is, that it is based on assertions which have no foundation either in fact or in the record. It is a misconception to say that the advertiser by "using" or speaking into a microphone superimposes a program upon carrier waves which are continually being sent out. The functions of Appellant as a radio broadcaster are not completed merely by turning over the microphone to the advertiser, i. e., allowing him to use its facilities. Rather they first begin at that time; all subsequent acts are those of Appellant.

The opinion of this Court in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, demonstrates this. This Court there said at p. 200:

> "As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether'. These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loudspeaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting

apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus."

In a footnote to the foregoing, Mr. Justice Brandeis refers to the decision of the Supreme Court of Australia in *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (1925), 50 Victoria Law Reports 350. In that case the Court in describing radio broadcasting says at p. 357:

> "With 'broadcasting' there are of course many places of audition. We may take a short statement from a recent book, 'Wireless,' by P. J. Risdon, F. R. S. A. At p. 139 he says:—'It is customary to speak of wireless transmission of speech and of converting sound waves into ether waves, and *vice versa,* but as a matter of fact we do nothing of the kind. *What we do is this: by means of sound waves we cause modulations in the flow of an electric current, which impress corresponding modulations on the aerial current, which in turn sets up a train of ether waves with modulations on them corresponding to the modulations in the original sound waves. At the receiving end the process is reversed, and sound waves are produced exactly like the original sound waves.'** At p. 144 he says that 'amplifying' a current or current variations does not mean magnifying the same current, but means that its variations are impressed upon another and more powerful current."

Similarly the activities of a radio broadcaster have been clearly described in an article by J. Warren Wright, (Radio Division, Bureau of Engineering, Navy Department) in 2 George Washington Law Review 13, 26. It is there stated:

---

* Italics ours.

"For the purpose of learning the actual facts let us assume that an orchestra is playing in a broadcasting studio located in one state and the sound waves are impressed on one or more microphones, located in the studio. This causes an alternating electrical current to be generated in the pick-up equipment. It is amplified and caused to modulate the radio frequency energy produced by the broadcast transmitter. This radio frequency energy is usually produced by the conversion of commercially available electrical into radio frequency energy. The output of the transmitter is then impressed on an antenna system from which a portion is radiated in the form of electromagnetic wave energy, which may be picked up by a suitable receiving system within range of the transmission considering the sensitivity of the receiver. Under the above conditions the transmitted wave causes a radio frequency current having similar characteristics to be set up in the receiving antenna which after being impressed on the receiver is amplified at radio frequency, detected (viz: demodulated), amplified at audio frequencies and converted back into acoustical energy by a loudspeaker. In this process the receiver is assumed to be properly adjusted and energized."

From the foregoing authorities it appears that the various steps of Appellant's activities for which it is paid, in simple language may be summarized as follows:

1. Appellant (i. e. the broadcaster) converts into electrical current the sound introduced by the advertiser into one or more microphones. This current has a low frequency, moves at the same rate of speed as sound, and is known as audio frequency current.

2. Appellant regulates this current, stepping it up or down as may be required and sends it along wires to its transmitting station.

3. At the transmitting station, Appellant introduces an entirely different current along a different set of wires. This is a high frequency current, moves with the speed of light, is described as radio-frequency current and is capable of being changed into carrier waves.

4. Appellant, at its transmitting station, takes the audio-frequency waves coming along the wires from its studio* and through complex instruments superimposes them upon the radio-frequency current, thereby creating a single current which is a high frequency current distorted by the superimposed audio-frequency current. This fused current travels at the speed of light.

Technically this procedure is described as the process whereby the radio-frequency current is modulated by the audio-frequency current. As stated by Mr. Justice Brandeis in *Buck* v. *Jewell-La Salle, supra,* the process of modulation may be compared to a recording on a wax record by a recording stylus.

5. Appellant then regulates this fused current, amplifying it if necessary, and sends it along wires to its antennae and from there it is radiated out into space and for the first time travels without the aid of wires in the form of electro-magnetic or modulated carrier waves.

---

* In the case of a chain broadcast, Appellant takes the audio-frequency waves coming from the wires furnished by the chain broadcaster. A chain broadcast means merely that numerous stations receive the same audio-frequency waves by different wires from a chain broadcaster and then the individual stations commence with step 3.

These electro-magnetic waves are thus transmitted by Appellant into several states and territories and the Dominion of Canada, and they are there picked up by the receiving sets of many listeners and amplified into sound. (See our main brief, pp. 9, 10, 11 and 17 to 23).

There can be no doubt, therefore, that advertisers do not pay Appellant merely for the privilege of using its microphone. *Advertisers pay Appellant to broadcast for them i. e. to transmit their programs in the form of electro-magnetic waves to the states and territories described in the record.* (See our main brief, pp. 9 to 13). Appellant's activities in so transmitting these messages constitute interstate commerce and its income from such activities are gross receipts from interstate commerce which cannot be taxed by the State of Washington. (See our main brief, pp. 23 to 25 and 35 to 41).

The absurdity of Appellee's analysis is made plain when it is applied to a telephone company operating in two states. According to Appellee's reasoning, since current is continually running through the telephone company's wires, all it does is to furnish a mouthpiece into which the telephone subscriber speaks and the activity of the telephone company is purely local. But the fact, of course, is that a telephone company does not fulfill its contract merely by furnishing a mouthpiece (comparable to a microphone) into which the subscriber speaks. Like Appellant, a telephone company performs its contract only when it converts that speech into audio-frequency current which it sends along a wire to a receiving instrument at the other end. The only difference between the functions of Appellant and those of a telephone company is that Appellant has three additional steps to perform before it fulfills its contract to broadcast a program: (a) it creates

radio-frequency current; (b) it modulates the latter by the audio-frequency current; and (c) it radiates the radio-frequency current so modulated out through the ether and across state lines in the form of electro-magnetic waves.

II.

The Cases Cited by Appellee are not Applicable.

1. Appellee's brief refers to the so-called bridge cases, *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83; *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150. Since Appellant's brief was prepared, an article, contained in 84 University of Pennsylvania Law Review 251, has been noted in which the instant case was referred to and the following comment made:

> "The instant court (i. e. Supreme Court of Washington) using similar reasoning (the reasoning of the bridge cases) proceeded in this manner: The broadcasting company completes its business operations by making available its facilities to commercial advertisers. Thereafter, the advertiser when he broadcasts is engaged in interstate commerce; but the company having fulfilled its obligations, is not. Obviously, from a factual viewpoint the court's reasoning is faulty. In order to insure the transmission of a message it is necessary for the broadcasting company constantly to employ technicians, operators, etc., to regulate the power, volume and clarity of tone. Such a situation is hardly comparable to bridge operation where, once the bridge is constructed and made ready for use, the one crossing the bridge needs generally no aid from the operating company to get to the other side. Rather, it would seem, the proper analogy is to the telephone and telegraph cases, where for the purpose of invalidating

> state occupation taxes, the United States Supreme Court has consistently held that the corporation supplying the facilities over which the intelligence was transmitted was engaged in interstate commerce. Factually, there is a great similarity in the quality of company aid necessary for insuring the reception of telephone messages and of radio broadcasting. If the analogy is valid, it appears that the tax in the instant case was imposed on the privilege of engaging in interstate commerce, and was therefore violative of the commerce clause."

It will be noted that the statements contained in the foregoing comment entirely support Appellant's argument as contained in its main brief.

In an article contained in the January, 1936 issue of the Harvard Law Review in Vol. XLIX, page 475 (referred to by Appellee), it is stated, referring to the case at bar:

> "Thus it might be argued that the radio broadcasting station furnishes a bridge from state to state over which its clients may project electrical waves carrying potential sound. But, in effect, the ether through which the waves travel is the 'bridge'. And the broadcasting station, the motivating force behind these waves, seems in the position of the *users* of the bridge in the Henderson case, driving across that bridge packets of energy containing sounds selected by its clients."

In a footnote on the same page the writer says:

> "The Washington court analogizing the ether to a bridge, considered the broadcasting company as leasing a device which enabled the advertiser to make use of the bridge . . . but since the broadcasting company controls the technical equipment, it alone carries messages across the 'ether bridge'."

2. Appellee relies on *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, to support its contention that if a producer of electricity is subject to a state license tax, notwithstanding the fact this electricity is transmitted to other states, a radio broadcaster should also be subject to such a tax on the theory that he manufactures the electro magnetic waves.

In that case there was no tax on the gross revenue derived from the interstate transmission of the power generated. The measure of the tax was one-half mill per kilowatt hour of electrical energy produced.

The tax in the *Pfost* case was sustained upon the ground that manufacturing electricity is essentially the same in legal effect as manufacturing tangible goods. This court compared it to mining ores and held that where the incidence of the tax is upon a manufacturing process or upon manufactured products at rest in the state prior to any transmission, the tax is valid. The theory was that the function of mining or manufacturing is distinctly separable from the function of transporting the articles manufactured or mined—the manufacturing or mining process being completed before any interstate movement began. That is to say, when the manufacturing or mining process is finished the taxpayer could stop and there would be one complete process which produced a finished product, whether there was or was not a subsequent movement in interstate commerce.

That the tax in the *Pfost* case if measured by a percentage of the gross income of the interstate transmission would have been plainly invalid, is pointed out by the opinion of this Court in that case. (See 286 U. S. at page 182). If one applies this reasoning and this distinction to

the case at bar, it is readily apparent that the tax here involved is invalid. Certainly if, as this court indicated in the *Pfost* case, the proceeds resulting from the sale of the electrical energy transmitted out of the State could not be taxed, then *a fortiori* the proceeds resulting from the transmission of electro-magnetic waves across state lines cannot be taxed in the case at bar.

In addition to the difference in the nature of the tax, the facts in the *Pfost* case are entirely different from those presented by radio broadcasting. Here there is nothing manufactured which comes to rest in one State. Everything done by Appellant prior to the actual transmission of the electro-magnetic waves is a component part of the act of radio broadcasting from which Appellant derives its sole revenue. The transmission happens simultaneously with the creation of the electro-magnetic waves. Appellant cannot stop at any stage and have a finished product solely within the State of Washington. The electro-magnetic waves once created, cover an interstate and foreign area.

3. Appellee cites *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, as sustaining an annual privilege tax based on the gross receipts of the business of producing and transporting natural gas in interstate commerce. The case did not so hold. What it did hold was that an occupation tax measured by a percentage of the value of the gas within the state is proper, but that the gross proceeds of sales of the gas in other states could not be taken as the value of such gas upon which this percentage was computed. This is clear not only from the opinion of this court but also from the opinion of the West Virginia Supreme Court whose order was affirmed on appeal. The following is quoted from the state court's opinion in 102 West Virginia 272 at 284:

> "We therefore hold under the facts in this case that the defendants (namely, the taxing officials) may not treat the gross proceeds of plaintiff's sales outside the state as the worth of its gas within the state but that they may enforce the act upon the value thereof *within the state* and *before it enters interstate commerce.*" [Italics by the Court, words in parenthesis ours.]

That the foregoing is the holding of the *Hope* case is to be seen also from the analysis made of that case by this Court in *Utah Power & Light Co.* v. *Pfost,* 286 U. S. at page 183.

The *Hope* case merely is another illustration of the type of tax which was sustained in the *Pfost* case and which is clearly different from the gross receipts tax involved in the instant case.

4. *City of Atlanta* v. *Oglethorpe University,* 178 Ga. 379, 173 S. E. 110. The Supreme Court of Georgia predicated its decision upon the absence of certain facts stipulated in the case at bar. In that case the Georgia court held that there was no evidence that the programs broadcast by the station transcended state lines or were received in other states and that it was not paid to transmit programs across state lines. The stipulated facts of the case at bar, on the other hand, demonstrate quite clearly that Appellant is paid to transmit messages in the form of electro-magnetic waves across State lines and that its messages do cross State lines (see main brief, pp. 9 to 13, 17, and 23-25); that all of Appellant's revenues are received from those "who desire to reach the listening public in areas and territory hereinabove described" (R. 7), to wit: the areas beyond the State of Washington reached by Appellant's stations (R. 5, 6).

Again, it should be noted that the segregation made in the *Oglethorpe* case of radio transmission as interstate and intrastate commerce is not the segregation made by the Appellee in this case. The Appellee here attempts to segregate Appellant's activities, not on the basis that broadcasts are confined to the State (which it could not because the State Court below has found in accordance with the stipulated facts and scientific knowledge that all broadcasts cross State lines), but on the basis that (a) the making of local contracts with sponsors whereby the sponsor is permitted and allowed access to Appellant's microphone is intrastate commerce, and (b) that non-commercial broadcasts constitute interstate commerce.

5. *Blumenstock Bros. Adv. Agency* vs. *Curtis Pub. Co.*, 252 U. S. 436.

This Court there held that contracts between an advertising agency, as broker, and a newspaper for the insertion of advertising material in a periodical did not constitute interstate commerce. It was, however, recognized in that case that the circulation and dissemination of the periodical in other states was interstate commerce. See, *Indiana Farmer's Guide Pub. Co.* vs. *Prairie Farmer Pub. Co.*, 293 U. S. 268.

How the *Blumenstock* case is at all relevant to the one at bar is difficult to see. Appellant is paid for transmitting messages, intelligence and information. In this respect it is similar to the telephone and telegraph companies which, pursuant to contract, transmit messages. If the *Blumenstock* case has any relevancy at all to the case at bar, it lies in the fact that it presents an analogy to demonstate that Appellant is engaged in interstate commerce. Certainly, if a newspaper publisher is engaged in interstate

commerce because he circulates information in the form of periodicals across State lines, then Appellant, which transmits intelligence, information and messages across State lines, is engaged in interstate commerce.

Conclusion.

The judgment of the Supreme Court of the State of Washington is erroneous and should be reversed.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC.,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES.

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Attorney General;
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INDEX.

Subject Index.

	Page
Statement of the case	1
Appellant's business in its nature is purely local	2
Appellant's revenues are realized solely from charges made for the use of local facilities	5
The taxing act was construed by the state court as neither a license fee nor a regulatory measure but an excise for revenue	12
Argument	13
The taxing act as construed and applied does not materially or directly affect interstate business	14
Cases involving occupational taxes hold that the occupation of radio broadcasting is local and that such taxes do not offend against the commercial clause	16
Commentators are of the opinion that a state occupation tax based on the business of radio broadcasting is valid	18
Cases involving occupation tax applied to analogous businesses also sustain the conclusion that the occupation tax in the case at bar does not contravene the commerce clause	20
Appellant's argument is based upon a misconception of the opinion of the state court and is not sustained by the authorities	29
Cases cited by appellant involving receipts from interstate transportation are not in point	31
Appellant's argument that the tax is a license tax and a prerequisite to the right to engage in business ignores the construction of the state supreme court	33
Conclusion	34

Table of Cases Cited.

American Manufacturing Co. v. St. Louis, 250 U. S. 459	28
Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436	25
Broad River Power Co. v. Query, 288 U. S. 178	22
Browning v. City of Waycross, 233 U. S. 16	15
Buck v. Jewell-LaSalle Realty Co., 283 U. S. 200	10
City of Atlanta v. Oglethorpe University, 178 Ga. 379, 173 S. E. 110	17, 18, 30
Cooney v. Mountain State Telephone Co., 294 U. S. 384	33
Covington Bridge Co. v. Kentucky, 154 U. S. 204	29
Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan, 294 U. S. 83	23, 24, 29
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465	32

Page

Edelman v. Boeing, 289 U. S. 249 28
Federal Compress Co. v. McLean, 291 U. S. 17 30
Helson v. Kentucky, 279 U. S. 245 28
Henderson Bridge Co. v. Kentucky, 166 U. S. 150 ..... 23, 24
Hope Natural Gas Company v. Hall, 274 U. S. 284 28
KVL, Inc. v. Tax Commission of Washington, 12 Fed. Supp. 497 16
Marconi Wireless Telegraph Co. v. Commonwealth, 106 N. E. 314 11
Mich. v. Mich. Trust Co., 286 U. S. 334 33
North American Service Co. v. A. T. Vick Co., 243 S. W. 549 15
Oliver Iron Co. v. Lord, 262 U. S. 172 28
Osborne v. Florida, 164 U. S. 650 ..... 12, 33
Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 32
Pacific Tel. & Telg. Co. v. Tax Commission of Washington, 84 Wash. Dec. 52; (affirmed, Nos. 544, 573, and 529, October Term, 1935, March 2, 1936) 13, 33, 34
Pacific Tel. & Telg. Co. v. Seattle, 172 Wash. 649 ..... 12, 33
Pearce v. Puget Sound Broadcasting Co., 170 Wash. 472 ..... 7, 25, 31
Rainier National Park Co. v. Henneford, 45 Pac. (2d) 617 (No. 541, Oct. Term, 1935, certiorari denied Dec. 9, 1935) 12
Sprout v. City of South Bend, 277 U. S. 163 32
Stafford v. Wallace, 258 U. S. 495 29
State ex rel. Steiner v. Yelle, 174 Wash. 402 13
Station WBT, Inc., v. Poulnot, 46 F. (2d) 671 15
Swift & Co. v. U. S., 196 U. S. 375 29
Sta-Shine Products Co. v. Station WGBB, 188 I. C. C. 271 ..... 3, 10
U. S. Fidelity and Guaranty Co. v. Kentucky, 231 U. S. 394 34
Utah Power & Light Co. v. Pfost, 286 U. S. 165 ..... 18, 20, 21
Whitehurst v. Grimes, 21 F. (2d) 787 ..... 14, 18, 19

STATUTES CITED.

Federal Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. A. 1064, 47 U. S. C. A., Section 151 ..... 10, 11
Interstate Commerce Act, Sections 1 and 3 4
47 U. S. C. A. Section 153, sub-division (h) 11
Washington State Occupation tax (Chap. 191, Laws of 1933) 1

OTHER AUTHORITIES CITED.

6 Fortune 37, 33 20
2 George Washington Law Review 9, 18, 21
Harvard Law Review for January, 1936, Vol. XLIX, No. 3 ..... 10, 19, 21
Michigan Law Review, Vol. 26 ..... 9, 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC.,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

BRIEF OF APPELLEES.

Statement of the Case.

The Supreme Court of the State of Washington sustained the Washington State Occupation tax (Chapter 191, Laws of 1933), as applied to the gross amount realized by appellants from the performance of contracts for the use of the broadcasting facilities owned and operated by it in the State of Washington. (R. 37.)

The court held that the tax involved was not a license fee, the payment of which was a prerequisite to the right to engage in business (R. 27), and held that the tax was based upon a business which was purely intrastate, wholly completed within the State and prior to and regardless of any interstate activity (R. 36).

Notwithstanding this holding, appellant now argues that the tax should have been held invalid as, first, being imposed on gross receipts from interstate commerce and, secondly, as being an attempt to condition appellant's right to engage in interstate commerce upon the payment of the tax.

The record shows that appellant's revenues are realized from the use of its broadcasting facilities situated in the City of Seattle, Washington. (R. 21.)

A close analysis of the business actually transacted by the radio stations which appellant operates will show that the tax as sustained by the State court is not based upon receipts realized from interstate activities but upon contracts locally performed and independent of anything in the nature of an interstate carriage or transaction.

Appellant's Business in Its Nature is Purely Local.

Appellant operates, under Federal license, two commercial broadcasting stations. Each of these stations is equipped with electric apparatus which can and does create an electrical disturbance in air which is analogous to waves in water. These radio waves are referred to as carrier waves as they will carry any program which may be superimposed on them by use of the apparatus in the radio station.

The waves continue to travel in space.

Any program which may have been superimposed upon the waves will be carried by the waves.

The program is not audible and may be detected only by means of a receiving apparatus or a radio set which, properly tuned, may take the program off of the radio wave, translate it into sound and amplify that sound so that the program may be heard.

The receiving set is, of course, not controlled in any way by the broadcasting station.

The distance at which the program may be heard depends upon the limitations of the receiving set rather than the power of the station which generates the carrier waves.

Appellant's license must be distinguished from a point to point license, which would authorize the licensee to transmit a message by wireless from a certain person to a certain person and to make a charge for the carriage of the message. Such a charge, being based upon a carriage or transmission of a message is subject to regulation by the proper Federal authorities as being based upon an interstate activity.

However, appellant is not licensed to carry messages or communications and its equipment is not such that it is possible for it to transmit communications to a certain person at a certain point. Appellant's license is simply for broadcasting. Radio waves are generated and programs placed upon them as a condition of the license in order to create and sustain public interest. Whether or not such programs are received depends upon conditions without the control of the transmitting station.

Appellant's receipts are realized from such contracts as it may make with advertisers to announce such advertisers as "sponsors" of the program. The exact nature of these contracts will be discussed later.

The charge which appellant makes to such advertisers is not a charge for the carriage or transmission of a message to a point or a person and is, therefore, not subject to regulation by Federal authorities (nor indeed to regulation by any authority).

Reference to the case of *Sta-Shine Products Co.* v. *Station WGBB*, 188 I. C. C. 271, will disclose an accurate description of the business transacted by a broadcasting company as distinguished from a wireless company operating under a point to point or person to person license.

In the *Sta-Shine Products Co.* case a certain corporation engaged in the sale of a liquid polish complained to the Interstate Commerce Commission that the advertising rates charged by the broadcasting company were unreasonable and unjust and in violation of Sections 1 and 3 of the Interstate Commerce Act.

The charges were brought under an Act which applied to common carriers engaged in the transmission of intelligence by wire or wireless for hire.

Defendants denied that they were common carriers or subject to the provisions of the Act.

In passing upon the question, the Commission correctly said that it was concerned merely with the accomplished broadcast *in its commercial aspects.* It said that defendants broadcasted two types of programs, sustaining and sponsored.

Sustaining programs are broadcasted at the expense of the broadcasting station to create general interest in its broadcasts and thus give them advertising value.

Sponsored programs are paid for by advertisers and such payments are the sources of a broadcasting station's revenues.

In explaining the business conducted, the Commission went on to say that the sponsor or advertiser might make up his own program and use artists of his own selection or the broadcasting company might create the programs and furnish the artists. (This is a matter of private contract.)

The Radio Commission has held that it was only concerned with the licensing of such stations and it had no jurisdiction over the charges of radio broadcasting companies to advertisers. It thus separated the non-commercial production of radio waves, over which the commission had licensing and regulatory jurisdiction, from the commercial aspect thereof over which it had no jurisdiction at all.

The advertiser then filed a complaint with the Interstate Commerce Commission in the *Sta-Shine Products* case. The radio station contended that the Interstate Commerce Act contemplated only point to point communication by wireless or the transmission of a message from a definite sender to a definite receiver for pay and that it had neither the authority, license nor equipment to do so.

The broadcasting company further contended that its business was essentially one of advertising, much the same in character as that of a newspaper or magazine, and that its advertising is done under private contract and only for such clientele as it wished to serve.

The Commission sustained this contention and in doing so said:

> "The defendants sell 'time' to the public, the program is put on the air, and then the broadcaster, having performed his contract, is finished. No service is performed at the receiving end of the broadcasting company, similar to the service performed by common carriers in the general transmission of messages."

It will be seen that the broadcasting company not only was not a "common carrier" but it was not a carrier at all.

Appellant's Revenues are Realized Solely from Charges Made for the Use of Local Facilities.

In the case at Bar, appellant also realizes its revenues from the sale of "time" (R. 20).

This is amplified by the stipulated facts that the revenues arise from the *use* of appellant's broadcasting facilities in broadcasting programs (R. 21).

This use might be by the National Broadcasting Company or a private firm or corporation. In any event, appellant is paid for the use of its facilities according to the time such facilities are so used.

In the event a chain broadcasting company wishes to use appellant's facilities, a program is brought to appellant's station by wire leased for that purpose and appellant is paid for the use of its facilities.

On the other hand, if appellant has not sold any of its time, it must cause a sustaining program, from which it receives no collateral revenue to be placed on the air.

In the event this program is bought from a chain broadcasting company, it is transmitted to appellant's studio by wire.

The point is that appellant not being engaged in the transmission of intelligence or the carrying of any communication or message *must obtain the services of a telephone or telegraph company which does carry messages and which is engaged in interstate commerce,* if it wishes to get a program to another station.

Appellant, unlike the telephone company, simply creates radio waves and sells the use of its apparatus to persons who may wish to place programs upon these waves.

Appellant's business begins and ends within the State of Washington. Its revenues are, therefore, entirely earned within the State of Washington and this regardless of whether the program is ever received or not. Appellant is entitled to pay for the use of its facilities for that period of "time" for which its facilities were available whether used or not.

It might be stated that the record in this case shows that the revenues upon which the occupational tax is based are derived from the use of appellant's facilities alone and not from any carriage of a message or transmission of a message (R. 21.)

The radio station sells "time" during which time the advertiser who pays may furnish his own program or ap-

pellant could and does sell "time" during which time the broadcasting station will furnish the talent.

In the latter event, the compensation will, of course, include a charge for the talent furnished and this charge will doubtless vary according to the character of the talent. In any event, it is a matter of private contract between appellant and advertiser.

Counsel for appellant have objected to the use of the word "lease". In the opinion of the Supreme Court of the State that word was used in the sense of its being synonymous with "use". The stipulated facts in this record were prepared by counsel for appellant using the word "use".

It was contended below and is admitted here that appellant does not lease its stations in the sense of turning over control of them to anyone else but that it does sell time, which entitles advertisers to the use of plaintiff's facilities.

In appellant's brief, counsel does not discuss the meaning of the word use or the exact nature of the business which appellant conducts. In order that there be no misunderstanding, a very definite illustration of appellant's business will now be given.

One instance of the business conducted by broadcasting stations similar to those operated by appellant is offered by the case of *Pearce* v. *Puget Sound Broadcasting Co.*, 170 Wash. 472.

In that case, the owner of the broadcasting station contracted with Mr. and Mrs. Pearce to allow them the use of their broadcasting facilities for one-half hour each morning for a period of one year for the sum of $200 per month.

The Supreme Court of Washington in the *Pearce* case referred to the payment as a "rental" and this description of the payment led to the use of the word "lease" in the case at Bar. However, the exact facts were that the operators of the broadcasting station at all times operated the stations themselves. The contract simply provided that

for one-half hour each morning the Pearces could speak into the microphone and thereby place upon the carrier waves created by the operation of the station a program arranged by themselves.

The radio station operators having failed to perform the contract by refusing to furnish their facilities to the Pearces, a suit for damage followed in the State Court. The Pearces recovered damages for breach of this contract.

It is important to note that the contract would have been performed by the broadcasting station if it had made the broadcasting facilities available for the allotted time whether or not the Pearces themselves used the facilities and whether or not programs placed upon the carrier waves by the Pearces were ever transmitted into sound by receiving sets.

It was the execution of such a contract that the Supreme Court of the State of Washington found to be business and it was the proceeds of such a contract that the Supreme Court held to be a proper basis for the computation of the business tax involved in this case. (R. 37.)

Now, in the *Pearce* case, Mr. and Mrs. Pearce themselves were in the radio advertising business (170 Wash., at page 473)—that is Mr. and Mrs. Pearce made the contracts with the local concerns who wished their products advertised.

As the Pearces had contracted to use the broadcasting facilities for a definite sum, they were entitled to keep the difference between the monies they received and that sum.

The radio station sought to break this contract by refusing the Pearces "time" on their Seattle station and tendering them "time" on a Tacoma station, Tacoma being a city some forty miles from Seattle. This was not acceptable to the Pearces as Seattle advertisers would have no use for "time" over a Tacoma station. (170 Wash., p. 478.)

The Pearces were finally forced to procure "time" from KJR, another broadcasting station in Seattle now operated

by appellant. This "time" was paid for by giving KJR one-half of the gross proceeds realized by the Pearces from their advertising contracts.

Ordinarily, the broadcasting station itself wishes to make all of the profits derived from these advertising contracts and it, therefore, makes these contracts directly with the different merchants and furnishes the talent comprising the program. In any event, the contract is performed when the talent so furnished uses the facilities of the broadcasting station.

The performance of this contract does not depend upon the transmission of the program to a properly tuned radio set. The money is earned as soon as the facilities and (if talent is sold) the talent is made available. It was the performance of such a contract, which precedes any transmission, which the Supreme Court of the State held the taxes applied to.

Another typical example of the business transacted by a broadcasting station is the sale of "time" to a candidate for public office. The candidate is charged a fixed sum for the opportunity of using the facilities for a certain length of time. In other words, he may speak in a transmitter and thereby place upon the carrier waves created by the carrier set a message which he hopes will reach local listeners, the time of his broadcast having been announced by newspapers, etc. The contract of the broadcasting station is performed when it furnishes the candidate with the opportunity of so speaking.

We have seen that broadcasting stations have likened themselves to newspapers and this is supported by technical writers. (2 George Washington Law Review, p. 14.)

But radio broadcasting has been more aptly likened to a band concert on one side of a State line being enjoyed by the public on the other side. (26 Mich. L. Rev., p. 921.)

The writer of the above article concluded that the State in which the band was playing could regulate the time and place of the playing without interfering with interstate commerce.

While the comparison of radio broadcasting to a free band concert is accurate, it must be remembered that radio waves are not audible unless they are detected and translated into audible sound waves by another complicated apparatus called a receiving set. The original program is not heard and the reproduction thereof by a receiving apparatus is a performance. *Buck* v. *Jewell-La Salle Realty Co.*, 283 U. S. p. 200.

It is obvious from the foregoing analysis that the actual creation of radio carrier waves which transcend interstate lines is non-commercial for the broadcasting station is required to do that as a condition for receiving the license. In fulfilling these conditions the broadcasting station broadcasts sustaining programs or programs at its own expense.

The commercial or business aspect appears for the first time when the radio station by a contract receives money for the use of its local facilities. (Harvard Law Review, Jan., 1936, at page 476.)

It is the gross amount received from this commercial and local aspect of appellant's activities which the Supreme Court of the State held to be subject to the occupation tax. (R. 37.)

We have seen that neither the Federal Radio Commission nor the Interstate Commerce Commission regulated the commercial business. (*Sta-Shine Products Co.* v. *Station WGBB*, 188 I. C. C. 271.) Therefore, the tax in the case at bar is imposed on a business which is not even regulated by Federal authority.

Since the holding in the *Sta-Shine Products* case Congress has passed the Federal Communications Act of 1934.

48 Stat. 1064, 47 U. S. C. A., 1064, 47 U. S. C. A., Section 151.

In this Act, Congress made a distinction in the commercial sense between point to point radio communication and radio broadcasting. The former licensee is classed as a common carrier and the latter is specifically excluded.

Title 47 U. S. C. A., Section 153, Subdivision (h) defines the term "common carrier" as including communication by radio with the following specific proviso:

> "But a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

The distinction is obvious. A wireless station which trahsmits a message for a fee placed upon such transmission is a carrier engaged in interstate commerce. *Marconi Wireless Telegraph Co.* v. *Commonwealth,* 106 N. E., at page 314.

A broadcasting station, however, simply makes charges for the use of local facilities. A broadcasting station neither owns nor controls property in other States as do telephone and telegraph companies, nor does it contract to contact any specific receiving set as does a wireless telegraph company.

Congress, therefore, refused to regulate in any way the commercial business of broadcasting stations as this was entirely intrastate. Title 3 of the Radio Communications Act of 1934 contains special provisions relating to radio.

The powers and duties of the Commission are limited to the classification and licensing of the stations, the making of regulations necessary to prevent interference, etc.

The Commission is specifically given authority to require illumination of radio towers *if, in its judgment, such towers may constitute a menace to air navigation.*

It will be seen that Congress specifically disclaimed any regulatory power over the rates, charges and other aspects

of the business conducted by broadcasting stations. It should follow logically, therefore, that a tax upon the rates which are the gross proceeds of the business does not affect commerce or contravene any Federal regulation. This was the conclusion of the court below.

The Taxing Act was Construed by the State Court as Neither a License Fee Nor a Regulatory Measure But an Excise for Revenue.

In order to properly classify the cases cited, it is necessary not only to have an accurate conception of the basic facts constituting the business to be taxed but an accurate conception of the taxing statute itself. This Court will accept the ruling of the Supreme Court of the State as to the construction and application of a State statute. *Osborne* v. *Florida,* 164 U. S., page 650.

Ch. 191, Laws of 1933, is not a regulatory measure but is a tax levied for revenue. (R. 27.) This has been the consistent holding of the Supreme Court of the State of Washington. A similar statute was so construed in *Pacific Telephone Co.* v. *Seattle,* 172 Wash. 649 (R. 27).

Neither is it a licensing tax imposed as a prerequisite to entering into business. *Ranier National Park Co.* v. *Henneford,* 45 Pac. (2d) 617. No. 541, October Term, 1935. Certiorari denied December 9, 1935.

Again, in the last cited case the Supreme Court of the State said that the taxing act here involved was not for the regulation of business but solely for revenue purposes.

Accordingly, in the case at bar the Supreme Court of the State held "payment of the tax is not a prerequisite to the right to engage in business, save insofar as process to enforce payment of a delinquent tax might interfere with the taxpayers' affairs."

The Taxing Act here involved is applied to commercial business. *State ex rel. Steiner* v. *Yelle*, 174 Wash. 402, at page 408.

The tax is laid upon all persons engaged in intrastate business and is measured by income solely from that business. It does not purport to tax the privilege of doing interstate business. It is moderate in amount and is not a disguised attempt to discriminate against interstate business.

Pacific Tel. & Telg. Co. v. *Tax Com'n of Washington*, 84 Wash. Dec. 52, 66; affirmed Nos. 529, 544, 573, March 2, 1936.

The word "business" is defined in the Act as including all activities engaged in with the object of gain (R., Appendix 2).

The "business", therefore, within the statutory definition in which appellant is engaged is the sale of "time" during which a person may "use" its facilities as that is the only remunerative activity indulged in a radio station owner. This application of the taxing statute to the facts in the case at bar is made very plain by the Supreme Court in the opinion below where the Court held that the State might levy the tax computed upon the gross amount received for the use of its facilities (R. 37).

ARGUMENT.

Counsel for appellant place undue emphasis on the fact that at certain places in its opinion, the Supreme Court of the State of Washington used the word "lease" as meaning the sale of the right to use local facilities, the facilities being at all times under appellant's control and management.

The Record does show that the receipts sought to be reached by this tax are realized from the use of facilities

within the State of Washington, which use must necessarily be local.

Counsel have also overlooked the fact that the State Supreme Court has held that payment of the tax is not a prerequisite to the right to engage in any kind of business.

This Court will look to the basic facts and will not be concerned with technicalities.

The Taxing Act as Construed and Applied Does Not Materially or Directly Affect Interstate Business.

Without analysis, counsel have cited a long list of cases in support of the contention that appellant is engaged in interstate commerce. (Appellant's brief, page 18.)

Most of those cases simply sustain the right of the Radio Commission to license broadcasting stations and to regulate the right to create radio waves by assigning bands of frequency, etc. This right is not disputed. It is not the business from which appellant receives remuneration.

We have in this case a taxing act which does not seek to regulate and which reaches only a business entirely completed locally and independent of any interstate aspect.

Such of appellant's cases as involved a species of tax will be briefly noted.

Whitehurst v. *Grimes*, 21 (2d) 787 involved a municipal ordinance sought to be applied to an amateur radio operator who had a license from the Federal Government.

The ordinance was construed as imposing a license fee as a prerequisite to the right to operate and it was, therefore, held to be void as the amateur operator was already licensed by the Federal Government.

The ordinance requiring this license as a prerequisite to broadcasting was quite different from the Taxing Act in the case at bar, which applies only to the receipts of a busi-

ness already being conducted when and if such receipts are realized. Moreover, the licensing ordinance in the *Whitehurst* case was sought to be applied on an amateur operator who actually communicated by means of his instrument and who was not engaged in a commercial business. The case is, therefore, not in point either on the facts or the law.

Station WBT, Inc., v. *Poulnot*, 46 F. (2d) 671, involved a tax which was construed by the Court as a tax for the privilege of owning or operating a receiving set.

It will be seen at once that this was not a tax similar to the one at bar nor was there any business involved in the case.

The *Poulnot* case might be authority for holding that a tax levied on the privilege of owning or using a transmitting set would be invalid.

But the State of Washington did not enact such a tax. It expressly enacted a business tax and measured the tax on the proceeds of the business, with the proceeds of which Congress has refused to interfere. The distinction is obvious.

If we were to assume a state of facts similar to the one in the case at bar and picture the owner of a receiving set establishing something in the nature of a theatre and charging admission, we would then have the owner of that receiving set engaging in a business.

Undoubtedly any interstate aspect terminated upon receipt of the program in the receiving apparatus and the business of selling admission to hear the program would be entirely local.

Browning v. *City of Waycross*, 233 U. S. 16.

North American Service Co. v. *A. T. Vick Co.*, 243 S. W. 549.

Of course, such a business would then be subject to a business or occupational tax similar to the one in the case

at bar not levied as a license but as an excise based upon the engagement in the local business or the privilege of doing so. In the case just assumed any transportation or interstate carriage would have ceased and the effect of an occupational tax based upon the conduct of the local business would be too remote to be a burden on any interstate transportation.

In the case at bar, the local business precedes any interstate transportation of a program and the occupational tax levied not upon the transportation but upon the business which precedes it is likewise too remote to offend against the commerce clause.

Cases Involving Occupational Taxes Hold that the Occupation of Radio Broadcasting is Local and that Such Taxes Do Not Offend Against the Commercial Clause.

Two cases have been cited by counsel for appellant in which occupational taxes similar to the tax in the case at bar were involved and where radio broadcasting stations protested against this tax.

The case of *KVL Inc.*, v. *The Tax Commission of Washington*, 12 Fed. Supp. 497, should first be noticed. This case involved an application for a preliminary injunction based only upon a showing in affidavit form by appellant. Respondent did not answer and simply challenged the jurisdiction of the Court by motion to dismiss. The lower Court found that it had jurisdiction and found probable cause for granting a temporary injunction on the application of the complainant. The case has not yet been heard on the merits and the Court did not, therefore, have occasion to pass upon the nature of the broadcasting business or the nature of the tax other than to hold that a cause of action was stated.

The Taxing Act involved in the KVL case has not been construed or applied to the radio business by the Supreme Court of the State.

The Taxing Act in the case at bar has been construed and applied to the local commercial business of selling "time" only. This construction will be accepted here.

There remains but one other case involving an occupational tax similar to the one in the case at bar sought to be levied upon the business aspect of radio broadcasting.

City of Atlanta v. *Oglethorpe University* was decided by the Supreme Court of the State of Georgia on February 14, 1934. The decision is reported in 178 Ga. 379, 173 S. E. 110.

Motion for rehearing was denied (173 S. E. 112). The case was then tried on the merits with the result that the tax was sustained and held to be constitutional. On January 21, 1935, the Supreme Court of Georgia adhered to its former ruling and sustained the tax as applied to broadcasting stations.

The case was thereafter appealed to this Court where it was No. 713 October term 1934. This Court noted probable jurisdiction, but the case was voluntarily dismissed by appellant on April 8, 1935.

The very question involved in the present case was before the Supreme Court of Georgia and that Court like the Supreme Court of Washington in the instant case, considered the nature of the business from which radio broadcasting stations realized profits and found it wholly intrastate and therefore taxable.

The Court pointed out that there was no evidence of a transmission of messages and that is the admitted fact in the case at bar, where the only facts are that the radio stations receive a consideration for the use of local facilities.

The Supreme Court of the State of Washington in the case at bar concurred with the reasoning of the Supreme Court of Georgia and said:

> "Respondent completes its contract and earns its compensation regardless of whether five stations or five thousand receive the message. In this connection, the holding of the Supreme Court of Georgia in the case of *City of Atlanta* v. *Oglethorpe University, supra,* is in point, and we agree with that court in holding that, as a practical proposition, broadcasting similar to that with which we are here concerned is an intrastate business, considered in connection with such a tax as is here in question."

Commentators are of the Opinion that a State Occupation Tax Based on the Business of Radio Broadcasting is Valid.

Mr. J. Warren Wright, of the Radio Division, Bureau of Engineering, Navy Department, Washington, D. C., and a member of the Bar of the District of Columbia, has a most instructive article in the George Washington Law Review, Vol. 2, at page 13.

Mr. Wright reasoning from the case of the *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 185, said:

> "• • • *It would appear that property, corporation, manufacturing or occupation taxes might be applied by the several States to the business of radio communication or broadcasting so long as such taxes are not levied against the transmission itself.* Seemingly, this last form of taxation was held invalid in the case of *Whitehurst* v. *Grimes* (21 F. (2d) 787) in which a district court passed on the validity of a municipal ordinance requiring a license to engage in the business of amateur or commercial radio communication. In that case, the court appears to have considered that the municipality was attempting to regulate a Federal matter already covered by the Radio Act

of 1927. When the case of *Whitehurst* v. *Grimes* is compared with the Power cases and all are considered in the light of the actual fact situations of radio, *it is submitted that radio generation and transmission which occur almost simultaneously, should also be considered in law to be separable and subject to the legal reasoning applied in the Power cases.*

"If this view is adopted and applied to regulation as well as taxation, the State in which a radio station is located would have jurisdiction for the purpose of taxing and regulating *those phases of the process of generation which are of a local nature.*" (Italics ours.)

In the case at bar the State does not seek to regulate any phase of the local process of generation of radio waves, but simply seeks to apply an occupational tax to a local business in which radio stations have been enabled to engage by virtue of the fact that they do generate radio waves as a condition of their license and for their own benefit.

Mr. Wright's knowledge of the technical process of radio broadcasting makes his opinion of value. In it, he points out the difference between a tax such as the one in the case at bar levied against a local business, which he thinks valid, and a license or regulatory tax which the Court held invalid in the case of *Whitehurst* v. *Grimes* relied upon by counsel for appellant.

A well reasoned article appears in the Harvard Law Review for January, 1936, Vol. XLIX, No. 3, at page 473. In this article, the commentator considers the exact nature of the business of radio broadcasting and makes the obvious distinction between the non-commercial transmission of radio waves which is regulated by the Federal Government and the local business which the State would have the power to tax. The production of a program is likened to the manufacture which precedes transmission and it was said "* * * the mere physical peculiarity of simultaneous manufacture and transmission incident to broadcasting should not deprive the States of the right to tax".

An excellent example of a similar business which is very evidently entirely intrastate is given in this article. The writer assumes the maintenance of a Neon sign board near a State line so that ideas would be carried by light waves to a person in another State. Light waves have shorter wave lengths than radio waves but both are contained in the same ether (6 Fortune 37, 33).

The writer of the articles says that the business of maintaining such a sign board might well be said to involve commercial activity only in the State where the sign board is maintained.

The writer in the Michigan Law Review, Vol. 26, p. 921, who likened broadcasting to a free band concert on one side of a State line which could be enjoyed by the public on the other side was of the opinion that the State in which the band was located could regulate the activities of the band without offending the commerce clause. Indeed, this conclusion would seem to be inescapable.

Now, if we were to assume that an advertiser in the State where the band was playing paid the leader of that band a sum of money for holding up an advertising placard or orally announcing advertising matter, would not such a contract entirely performed within the State be a local matter?

It is submitted that the radio station derives its only proceeds from such advertising contracts which constitute a local business subject to State taxation.

Cases Involving Occupation Tax Applied to Analogous Businesses Also Sustain the Conclusion that the Occupation Tax in the Case at Bar Does Not Contravene the Commerce Law.

In *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, this Court sustained a State license on electricity produced at a point within the State but which was transmitted therefrom and sold to consumers in another State. The generation,

transmission and distribution of the electricity was a continuous and direct process accomplished without appreciable lapse of time. The tax was sustained by this Court, notwithstanding the fact that it was necessary to measure the electricity delivered at the meters in the foreign State.

The Court so construed the State statute as to sustain it. It divided the almost simultaneous operation of the production and transmission of electricity into two parts—manufacture and transmission—and held that the tax was valid as applied only to the local process of manufacture.

In the case at bar, the Supreme Court of the State has construed this act as applied only to the making and performing of local contracts for the use of local apparatus. Insofar as applicant manufactures a program, the receipts from this manufacture certainly precede any transmission of radio waves and the tax in the case at bar, construed as it has been is sustainable under the doctrine of the *Utah Power Co.* v. *Pfost* case.

The marked similarity between the production and transmission of electricity and radio waves was explained in the article by Mr. Wright, reported in 2 George Washington Law Review, at page 17.

The writer in the Harvard Law Review for January, 1936, referring to the reasoning in the *Utah Power & Light Co.* v. *Pfost* case, also says:

> "A mechanical application of this reasoning would allow, concurrently with Federal regulation of Radio Transmission as interstate commerce, State taxation of the manufacture of radio waves since as much separation between manufacture and transmission exists in the conversion of electric power into radio energy as in the conversion of water power into electric energy" (p. 478).

The doctrine of *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, that a tax levied on the manufacture of the energy

is not a direct burden on interstate commerce and is therefore valid, was reaffirmed and extended in *Broad River Power Co.* v. *Query*, 288 U. S. 178.

As these technical writers have pointed out, if we treat the business of the radio broadcasting company as the manufacture of electric energy and the sale thereof to a recipient or consumer in another State, there is enough separation between antecedent manufacture and the following transmission to justify the levying of a State tax on the manufacturer as distinguished from the transmission.

But the case for the validity of the occupational tax as construed and levied by the Supreme Court of the State of Washington is much stronger.

For the contract is not to sell the electric energy or to sell anything to anyone in another State. The radio station, as we have seen, furnishes the electric energy without charge as a prerequisite to maintaining public interest under its license and in order to create an advertising value.

Using the word business in the sense of the Taxing Act as meaning a commercial activity engaged in with the object of gain, the business of the radio station is limited to the making and performance of contracts with advertisers for the use of local facilities which are generating the electrical impulses any way.

The performance of that contract is collateral to the manufacture and the transmission of the electrical impulses which would go on any way, so that it is not necessary in the case at bar for the Court to make the distinction it did in the *Utah Power & Light Co.* v. *Pfost* case, in order to separate the intrastate from the interstate aspects.

The fact that the broadcasting company is enabled to make a little money locally from the performance of contracts whereby for given periods of time advertisers may use the local facilities does not to any extent burden or hinder the transmission of the radio waves.

In order to illustrate the fact that the tax in the case at bar does not bear directly on any interstate activity, we may assume a source of revenue one step further removed from that activity. Assume that the broadcasting station having an up-to-date studio adopted a policy of charging admission to people who wished to examine the studio or perhaps to listen to the artists who use the facilities and make up the sponsored program.

Certainly, the business of charging admission is at least two degrees removed from the actual transmission of radio waves and a tax levied upon that business would certainly not affect that interstate transmission.

Many illustrations might be given of businesses which precede transmission in interstate commerce and which, therefore, may be taxed by the State.

It is submitted that the business of owning and operating an interstate bridge affords an analogy.

In the case of *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board of Michigan*, 294 U. S. 83, this Court following *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, upheld a State tax on a company operating a bridge between two States upon the ground that the company which operated the bridge was not engaged in an interstate activity and that only persons who used the bridge were so engaged.

The *Detroit Bridge Co.* case involved a privilege tax. This Court in sustaining that sort of a tax as levied against the privilege of exercising the corporate business and as measured upon the paid up capital and surplus, relied upon the following quotation from the *Henderson Bridge Company* case:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business.

> That business was carried on by the persons and company which paid the bridge company tolls for the privilege of using the bridge."

Applying that analogy to the case at bar we have appellant constantly maintaining an apparatus creating radio waves. It receives money (in the nature of tolls) for allowing people to use that apparatus. It is true that the equipment of the radio station is constantly controlled and operated by the radio company but so is the bridge operated, maintained and controlled by the bridge company. In each case the company realizes receipts for the privilege of allowing people to use the equipment so operated and maintained. In the one case, it is the bridge—in the other a broadcasting station.

The Record in the case at bar shows the receipts upon which the State tax is to be applied and to which the tax is limited are derived solely from this use of its facilities.

The reasoning by which the Court sustained the tax involved in the *Detroit International Bridge* case, 294 U. S. 83, and the *Henderson Bridge Co.* case, 166 U. S. 150, requires the sustaining of the tax at bar.

In the *Henderson Bridge Company* case, the State tax was measured by gross receipts. It was sustained notwithstanding the fact that payment of the tax might be supposed to increase the rate of tolls charged to the users of the bridge. This Court said that such an effect was too remote and incidental to make any tax on the bridge company's business invalid.

It must be remembered that in the case of the bridge, the tolls are regulated by Federal authorities but that in the case of the radio station the charges made by the radio station to persons using its apparatus are not subject to regulation either State or Federal, it being in the nature of a local advertising business.

It must be remembered that the stipulated facts in this case are that appellant's only revenues are received from the "use" of its local facilities and that, therefore, the facts of this case are exactly similar to the facts in the bridge case. However, in the case at bar we have seen that the local facilities might be used by (a) either by the advertiser himself or (b) by the talent selected either by the advertiser or by the broadcasting station.

(a) If the advertiser or the political candidate speaks into the microphone, he is using the facilities and broadcasting a message. The analogy here between the bridge cases and this type of use of the radio facilities is complete. The receipts from this type of use are, therefore, taxable as are the tolls for the use of the bridge.

The type of arrangement illustrated in the case of *Pearce* v. *Puget Sound Broadcasting Co.*, 170 Wash. 472, whereby Pearce broadcasted an advertising program which he himself had arranged, paying the station a "toll" or charge for the "use" of the station for one-half hour each day would fall into this class.

However, the broadcasting station itself usually desires to make the profit which Pearce derived from arranging the contracts with the advertisers. Therefore, it usually employs persons to solicit the advertising contracts directly with merchants. As a result, the broadcasting company is itself in the identical business (that of soliciting advertising) which Pearce was engaged in.

It is well settled that securing contracts for advertising is not interstate commerce.

To this effect, the holding of this Court in *Blumenstock Bros. Adv. Agency* v. *Curtis Pub. Co.*, 252 U. S. 436, is cited.

In that case this Court held that contracts for magazine advertising, which the defendant publisher had conspired to

monopolize, were not interstate commerce so as to create a liability under the Sherman Act. The Court, of course, recognized the distinction between that business and the actual circulation and distribution of the magazines in which the advertising matter was inserted.

In making the distinction between the business of entering into and performing the contract for advertising and the subsequent distribution and circulation of the advertising medium this Court said:

> "This case is wholly unlike *International Textbook Co.* v. *Pigg,* 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another state, was not engaged in interstate commerce; and within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495. We held in *Hopkins* v. *United States,* 171 U. S. 579, that the buying and selling of livestock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the livestock was sent from other states. In *Williams* v. *Frears,* 179 U. S. 270, we held that labor agents engaged within the State of Georgia in hiring persons to be employed outside the State were not engaged in Interstate Commerce. In *Ware & Leland* v. *Mobile County,* 209 U. S. 405, we held that brokers tak-

ing orders and transmitting them to other states for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of *United States Fidelity & Guaranty Co.* v. *Kentucky*, 231 U. S. 394, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the state, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the state. • • •

"Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. • • •" (Italics ours.)

Writers in the articles heretofore referred to have likened the receipts from the advertising contracts in the *Blumenstock* case to receipts from advertising contracts entered into by radio broadcasting stations and reasoning from the *Blumenstock* case have concluded that an occupational tax similar to the one at bar levied upon these receipts would be held constitutional as levied only upon intrastate business.

(b) As we have seen, the radio station itself may sell to the advertisers the service of artists, together with the right to use the facilities for certain periods of time, during which periods of time the artists (as agents of the advertiser) use the broadcasting facilities and place programs upon the radio waves.

In so far as the radio station furnishes the services of talent, the business is still further removed from any interstate aspect and certainly that portion of the receipts covering the service of the talent is entirely local. The effect of a tax levied on such receipts would certainly be too remote and incidental to burden any interstate transmission.

It is, of course, well settled that a State may impose a license tax on productive processes carried on within its borders even though all of the products are to be carried into another State for use there and even though the tax must be computed upon the amount of the sales.

American Manufacturing Co. v. *St. Louis,* 250 U. S. 459.

Oliver Iron Co. v. *Lord,* 262 U. S. 172.

In *Hope Natural Gas Company* v. *Hall,* 274 U. S. 284, an "annual privilege tax" based on the gross receipts of the business of producing and transporting natural gas in interstate commerce was sustained.

The tax was construed as being upon the production as distinguished from the transportation and, therefore, this Court found that it was not a tax on gross receipts from interstate commerce.

In *Edelman* v. *Boeing,* 289 U. S. 249, this Court sustained an excise tax on gasoline construed as a tax on the "use" of gasoline within the State. The use was limited to the act of withdrawing the gasoline from storage and placing it in the fuel tanks of airplanes, being flown in interstate commerce. This tax would probably have been held invalid if construed as being imposed on the use of gasoline in interstate commerce under the doctrine of *Helson* v. *Kentucky,* 279 U. S. 245.

In the case at bar the State Court has construed the tax as being upon the "use" of local facilities and as so construed it is not obnoxious to the commerce clause.

Appellant's Argument is Based Upon a Misconception of the Opinion of the State Court and is Not Sustained by the Authorities.

Appellant's first and second points are that the broadcasting business is interstate and foreign commerce and that appellant's gross income is derived therefrom.

In making this argument counsel fails to follow the distinction plainly pointed out by the Supreme Court of the State between the revenues realized from the "use" of local facilities, which were held to be taxable and the process of transmission of radio waves and the furnishing of programs at appellant's own expense, which the Court held to be non-commercial and not taxable.

The State Court said:

> "Insofar as respondent itself uses its stations, it pays no tax, and insofar as it allows others to use them for compensation, it is not engaged in interstate commerce." (R. 37.)

The cases cited by counsel for appellant to the effect that Congress has the power to regulate transmission of radio energy are not authority for limiting the power of the State to impose an occupational tax upon the proceeds realized from advertisers for the use of facilities.

In taxation cases, the question always is, does the tax so directly affect interstate commerce as to amount to a regulation of it?

Stafford v. *Wallace,* 258 U. S. 495.
Swift & Co. v. *U. S.,* 196 U. S. 375.

A State excise tax is valid as levied against the proceeds arising from the use of an interstate bridge (*Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83) but that State could not regulate the tolls charged (*Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204).

In *Federal Compress Co.* v. *McLean,* 291 U. S. 17, we have an example of a business licensed and regulated by the Federal Government but subject to the payment of an annual privilege tax levied by the State government.

It has been shown that the only case cited by counsel for appellant which involved an occupation tax levied against the business of radio broadcasting and which was tried on the merits, held that the receipts from that business are not realized from interstate commerce.

City of Atlanta v. *Oglethorpe University,* 178 Ga. 379, 173 S. E. 110.

That appellant's gross income is not derived from any interstate activity is readily apparent from the fact that it is necessary to lease a telephone wire to get a program from one station to another where the boadcasting station buys a program from a chain company or the chain company buys the "use" of the local broadcasting facilities for a certain period of time. The only way the program can be conveyed is by having some company which is in the business of interstate commerce carry that program.

The advertising value of each station is local and if it is sought to carry on a national advertising campaign, that must be done by the use of local facilities, the interstate carriage of the program being by wire and not by broadcasting.

The third point argued by appellant is that the State Supreme Court based its holding on the fact that appellant was engaged in the business of leasing its station to advertisers and counsel for appellant argues that this is not correct as appellant does not surrender control of the operation of its broadcasting stations.

This Court will gather the holding of the State Supreme Court from the entire opinion and not from the inadvertent use of the word "lease" in certain places.

The fact is that the word "lease" was used in argument below and in the opinion of the Court, inasmuch as the State Supreme Court in *Pearce* v. *Puget Sound Broadcasting Co.*, 170 Wash. 472, used the word "rental" in describing the monthly sum paid to the broadcasting station in that case for the use of its facilities.

Whatever term is used to describe the gross proceeds realized by appellant from allowing a political candidate to use the broadcasting station's facilities for a certain length of time, the fact remains that the Supreme Court limited this tax to the proceeds from such use.

The stipulated fact was that the proceeds realized by appellant are from the use of its facilities and the Supreme Court of the State limited the application of the tax to monies realized for such use. (R. 37.)

Cases Cited by Appellant Involving Receipts from Interstate Transportation are Not in Point.

Appellant's main argument is that the performance of the contract between the radio broadcasting company and the advertiser is only incidental to the production of the radio waves which are transmitted and that the receipts from the contracts are, therefore, receipts from interstate commerce.

This argument is based upon cases involving the performance of contracts for interstate transportation. In the case at bar, the performance of the contract is completed when (assuming an illustration) the broadcasting facilities are made available to the political candidate for the period of time contracted for.

In the railroad, telephone and telegraph cases cited by appellant the receipts are realized from the actual carrying of passengers or the carrying of messages across State lines. The performance of the contracts in such cases

necessarily involves an interstate journey and the use of interstate facilities.

In the case of the railroad, the entering into the contract in one State may be incidental to the main business, which is interstate transportation. But in the case of the radio station the contract is performed in the State where the facilities are located and this constitutes the entire business. Counsel for appellant cite and rely on *Ozark Pipe Line Corporation* v. *Monier,* 266 U. S. 555, in which the corporation was engaged in the business of piping natural gas through the State. There was, of course, no distinct local business such as the Court found in *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, where this Court sustained a State "gross receipts tax" imposed upon corporations supplying natural gas to consumers.

In the last cited case, the gas was engaged uninterruptedly in an interstate journey from the time it left the source in one State and reached the gas jet in the consumer's home in another State. But the Court pointed out that the gas at some point inside the State of Ohio passed from the main distribution pipe in which it traveled at high pressure and low volume into local supply mains, in which it traveled at reduced pressure and expanded volume.

The Court likened this breaking down of pressure to the opening of an "original package". It therefore held that the business was essentially local and subject to taxation and that the license tax imposed upon such a local business did not affect interstate commerce so directly as to burden it.

It is submitted in the case at bar that the business from which appellant realized its revenues is essentially local and taxable.

Sprout v. *City of South Bend,* 277 U. S. 163, involved the actual business of interstate transportation. This case and

the case of *Cooney* v. *Mountain State Tel. Co.* was distinguished as to the effect of the tax in *Pacific Tel. & Telg. Co.* v. *Tax Com'n of Washington*, Nos. 529, 544 & 573, March 2, 1936.

Cooney v. *Mountain State Telephone Co.*, 294 U. S. 384, involved the business of actually transmitting telephone conversations from a point in one State to a point in another State. It is submitted that the Supreme Court of the State of Washington was correct in distinguishing between the receipts realized from the local business in the case at bar and the receipts realized from interstate transportation involved in the cases cited by appellant.

Appellant's Argument that the Tax is a License Tax and a Prerequisite to the Right to Engage in Business Ignores the Construction of the State Supreme Court.

Appellant argues that the taxing act in the case at bar is a licensing act which attempts to condition appellant's right to engage in interstate commerce upon the payment of the tax.

The State Supreme Court specifically held that payment of this tax was not a prerequisite to the right to engage in business whether that business be intrastate or interstate. (R. 27.)

In construing a similar tax, the Supreme Court of the State of Washington pointed out that the tax was for revenue and not for regulation; that the use of the word "license" was a means of collection, the license being only a receipt for the tax.

Pacific Tel. & Tel. Co. v. *Seattle*, 172 Wash. 654.

This construction and application of the Taxing Act will be accepted by this Court.

Osborne v. *Florida*, 164 U. S. 650.

Mich. v. *Mich. Trust Co.*, 286 U. S. 334.

This construction of the same taxing act was accepted and the act sustained as applied to the intrastate business of a telephone company and two railroad companies.

Pacific Tel. & Telg. Co. et al. v. *Tax Com'n of Washington,* 84 Wash. Dec. 52, 66; Affirmed Nos. 529, 544, & 573, October Term, 1935, decided March 2, 1936.

Conclusion.

In any event, it cannot be argued that the burden of the tax in the case at bar falls directly upon any interstate activity.

Appellant is under the burden of broadcasting a sustaining program at its own expense by virtue of its license. If, therefore, it can by private contract procure advertisers or sponsors to broadcast these programs or pay for their being broadcast, appellant is to that extent relieved of the burden imposed by the license.

It is well settled that a state tax will not be declared invalid unless it is a direct burden on interstate commerce.

Pacific Tel. & Telg. Co. v. *Tax Com'n of Washington,* 84 Wash. Dec. 52, 66; Affd. Nos. 544, 573 & 529, March 2, '36.

In the case of *U. S. Fidelity and Guaranty Co.* v. *Kentucky,* 231 U. S. 394, this Court sustained an occupational tax as imposed on commercial agencies as not being a direct burden on interstate commerce. I quote from page 399:

> *"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."* (Italics ours.)

It is submitted that the judgment of the Supreme Court of the State of Washington is correct and should be affirmed.

Respectfully submitted,

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(7508-C)

SUPREME COURT OF THE UNITED STATES.

No. 628.—October Term, 1935.

Fisher's Blend Station, Inc., Appellant, *vs.* The Tax Commission of the State of Washington, et al.	Appeal from the Supreme Court of the State of Washington.

[March 30, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of the State of Washington, Judicial Code, § 237, presents the question whether a state occupation tax, measured by the gross receipts from radio broadcasting from stations within the state, is an unconstitutional burden on interstate commerce.

Appellant brought suit to enjoin appellees, the State Tax Commission, from collecting the tax, laid by § 2 of Chapter 191 of the Washington Laws of 1933, as an infringement of the commerce clause of the federal Constitution. On demurrer to the bill of complaint, and on stipulation of the parties that the cause might be decided upon the facts there alleged, the state Supreme Court gave final judgment for the appellees. — Wash. —.

Appellant maintains, within the state, two broadcasting stations licensed by the Federal Radio Commission (now the Federal Communications Commission). One is licensed to operate with power and a radio frequency enabling it to broadcast throughout the "fifth zone," which comprises eleven western and northwestern states, including Washington, and the Territories of Alaska and Hawaii. The other is licensed to operate as a "clear channel" station, that is to say, a station to which the Commission has assigned a radio frequency to be used at such times and with such power as will enable it to broadcast throughout the United States without interference by other stations. §§ 2, 4, 5, Federal Radio Act of 1927,[1] 44 Stat. 1162; Regulations, Federal Radio Commission, File No. 5-R-B-63 and Official No. 63; File No. 5-R-B-67 and Official No. 67, Nos. 70-75, No. 111, Nos. 116-124. These stations broadcast over

[1] This Act has been superseded by the Act of June 19, 1934, 48 Stat. 1081. 47 U. S. C. § 301ff.

the areas for which they are licensed, and the adjacent high seas and a part of Canada.

Broadcasting, according to the allegations of the complaint, is accomplished by the generation, at the broadcasting station, of electro-magnetic waves, which pass through space to receiving instruments which amplify them and translate them into audible sound waves. The essential elements in the broadcasting operation are a supply of electrical energy, a transmitter, the connecting medium or "ether" between the transmission and receiving instruments, and the receiving mechanism.

Appellant's entire income consists of payments to it by other broadcasting companies or by advertisers for broadcasting, from its Washington stations, advertising programs originating there or transmitted to them from other states by wire. Appellant "sells time" to its customers at stipulated rates, during which it broadcasts from its stations such advertising programs as may be agreed upon. During such time as is not sold, it broadcasts, at its own expense, "sustaining" programs, as required by the regulations of the Federal Radio Commission. The customers desire the broadcasts to reach the listening public in the areas which appellant serves, and a large number of persons, many of them in other states, listen to the broadcasts from appellant's stations.

The state Supreme Court recognized that state taxation of gross income derived from interstate commerce is forbidden by the commerce clause. But it upheld the tax on the ground that the business from which appellant receives its income is not interstate commerce. It conceded, as it had previously held, *Van Dusen* v. *Department of Labor and Industries,* 158 Wash. 414, that broadcasting is commerce, and that the broadcasting by appellant of its own programs for which it does not receive pay is interstate commerce. But it concluded that appellant's remunerative business is not interstate commerce because it consists of furnishing, within the state, the facilities of its stations to customers who use them for broadcasting their programs, and the business of providing such facilities, like that of providing a bridge for the use of others in crossing state lines, is not commerce. See *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83; *Henderson Bridge* v. *Kentucky,* 166 U. S. 550.

We may assume, although it is not alleged, that appellant's customers produce the sounds which are broadcasted. But it suf-

ficiently appears, although the complaint does not specifically so state, that appellant, and not the customer, generates the electric current and controls the apparatus (generator, transmitter and their controls) by which the sounds are broadcasted. The complaint states that appellant operates its stations and conducts the business of broadcasting in the manner already described, and that the license to operate them is granted to appellant by the Federal Radio Commission under the Federal Radio Act. These allegations, read in the light of the statute, which forbids any save licensees to operate broadcasting apparatus, § 1, Federal Radio Act of 1927, 44 Stat. 1162, and of the facts of which we have judicial knowledge, see *Buck* v. *Jewel-LaSalle Realty Co.*, 283 U. S. 191, 200; *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664, 670, *et seq.*, must be taken to state that the broadcasting of radio emanations, as distinguished from the production of the sounds broadcasted, is effected by appellant and not by its customers.

The sounds broadcasted are not transmitted from the microphone to the ears of listeners in other states. They do not pass as sound waves to the receiving mechanisms. They serve only to enable the broadcaster, by the use of appropriate apparatus, to modulate the radio emanations which he generates. These emanations as modulated, are projected through space to the receiving sets. There, by a reverse process, they so actuate the receiving mechanisms as to produce a new set of sound waves, of frequencies identical with those produced at the microphone. On the argument it was conceded that, in broadcasting for its customers, appellant, by generating the necessary electric power and controlling the transmitter, produces the radio emanations which actuate the receiving mechanisms located in other states. Upon the facts alleged, we see no more basis for saying that appellant's customers do the broadcasting than for saying that a patron of a railroad or a telephone company alone conducts the commerce involved in his railroad journey or telephone conversation.

Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other states who "listen in" through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which

is interstate commerce. *Western Union Telepraph Co.* v. *Speight,* 254 U. S. 17; *New Jersey Bell Tel. Co.* v. *State Board of Taxes,* 280 U. S. 338; *Cooney* v. *Mountain States Tel. & Tel. Co.,* 294 U. S. 384; No. 593, *Pacific Tel. & Tel. Co.* v. *Washington,* decided March 2, 1936. In each, transmission is effected by means of energy manifestations produced at the point of reception in one state which are generated and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, "the ether", is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of "intercourse", which is commerce. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 189.

Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensible effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission* v. *Nelson Bond & Mortgage Co.,* 289 U. S. 266, 279.

It is unnecessary to determine whether, as the court below suggested and appellee argues, like considerations would require us to hold that the exposure of a sign board, in one state, to the view of dwellers in another, is likewise interstate commerce. Whether the practical and scientific aspects of such an operation bring it within the range of those factors which we deem controlling here, may well be left for decision when such a case is presented. See *Pantomimic Corporation* v. *Malone,* 238 Fed. 135.

As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. *Philadelphia & So. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Galveston, H. & S. A. R. Co.*

v. *Texas,* 210 U. S. 217; *Crew-Levick Co.* v. *Pennsylvania,* 245 U. S. 292. But appellee further contends, as the state court thought, that, even though broadcasting involves interstate commerce, the maintenance and operation of appellant's stations includes intrastate activities which may be subjected to state taxation, as was the generation of electricity, transmitted to points outside the state, in *Utah Light & Power Co.* v. *Pfost,* 286 U. S. 165. There the tax was measured by the amount of current generated at the taxpayer's hydro-electric plant, from which electric power was supplied to consumers in other states. This Court held that the operation of generating electrical power, although virtually simultaneous with its transmission, is so distinct and separable from the operation of transmission, in interstate commerce, as to be the appropriate subject of a state tax. The argument now made overlooks the fact that the present tax is not levied upon or measured by appellant's generation of electro-magnetic waves, but by its gross receipts for the service it performs, which includes both the generation of the energy and its transmission as a means of communication interstate.

Whether the state could tax the generation of such energy, or other local activity of appellant, as distinguished from the gross income derived from its business, it is unnecessary to decide. See *City of Atlanta* v. *Oglethorpe University,* 178 Ga. 379. It is enough that the present is not such a tax, but is levied on gross receipts from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail, *Cooney* v. *Mountain States Tel. & Tel. Co., supra;* cf. *Pacific Tel. & Tel Co.* v. *Washington, supra,* and the judgment of the state court must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.